83-747

No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the builder of an interstate rapid transit system that purchases compensation benefits for injured laborers, pursaunt to its obligation under a federally-approved interstate Compact to act as general contractor, is entitled to the statutory immunity from suit granted to contractors by the Longshoremen's and Harbor Workers' Compensation Act, or whether, as held by the District of Columbia Circuit, injured employees may recover both compensation and damages from the builder.

2. Whether the builder forfeits its statutory immunity from suit simply because it initially purchased workers' compensation protection for all construction employees rather than first demanding that contractors—many of whom were uninsurable—themselves obtain workers' compensation insurance.

LIST OF PARTIES

Paul D. Johnson was the appellant in Nos. 82-2017, 82-1899, and 82-2458, before the United States Court of Appeals for the District of Columbia Circuit. Howard L. Eighmey was appellant in Nos. 82-1784, 82-2148, and 82-2531. Calvin Walker was appellant in Nos. 82-1809, and 82-2529. Calvin Walker and Rena Walker were appellants in Nos. 82-2062. John Warren Clanagan was appellant in Nos. 82-1813, 82-2063, and 82-2530. Stanley Wilmes was appellant in Nos. 82-2374, and 82-2525. James H. Buchanan and Shirley Buchanan were appellants in No. 82-2459. Glenwood Williams was appellant in No. 83-1003.

The Washington Metropolitan Transit Authority, Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc., were appellees in each case before the Court of Appeals.*

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* Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc. are affiliates of Bechtel Group, Inc. Other affiliates of Bechtel Group, Inc., include Bechtel Power Corp., Bechtel Petroleum, Inc., Bechtel Investments Inc., and Bechtel Professional Corporation, Virginia. Also appearing in the District Court but not in the Court of Appeals were Gordon H. Ball, Inc., S. A. Healy Co., Granite Construction Co., James McHugh Construction Co., McClean, Grove & Skanska, Fruin-Colnon Construction Co., Horn Construction Co., J. F. Shea Construction Co., Morrison-Knudsen Contractors, Shea-S&M Joint Venture, and Slattery Associates, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Washington Metropolitan Area Transit Authority prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The decisions of the United States District Court for the District of Columbia granting WMATA's motions for summary judgment (Appendices A-G, App. 1a-31a) are not officially reported. The decisions of the District Court denying plaintiffs' motions for postjudgment relief under Fed. R. Civ. P. 59(e) and 60(b)(3) (Appendices H-L, App. 32a-36a) are not officially reported. The decision of the United States Court of Appeals for the District of Columbia Circuit (Appendix M, App. 37a-64a) from

which certiorari is sought, is not yet officially reported. The orders of the Court of Appeals denying a Petition for Rehearing and a Suggestion for Rehearing En Banc (Appendices N and O, App. 65a, 66a) are not officially reported. The Court of Appeals' Order staying issuance of its mandate to November 7, 1983, pending the filing of a petition for a writ of certiorari (Appendix P, App. 67a) is not officially reported.

JURISDICTION

The Court of Appeals' decision in these cases was rendered on August 19, 1983 (App. 41a). A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on September 2, 1983, and denied on October 3, 1983 (App. 65a, 66a). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Section 12 of the Washington Metropolitan Area Transit Authority Interstate Compact (Pub. L. No. 89-774, 80 Stat. 1324 (1966)) provides, in part:

> 12. In addition to the powers and duties elsewhere described in this Title, and except as limited in this Title, the Authority may:
>
> (d) Construct * * * real and personal property * * * but all of said property * * * shall be necessary or useful in rendering transit service or in activities incidental thereto; * * *
>
> (f) Enter into and perform contracts * * * with any person, firm or corporation * * * including, but not limited to, contracts or agreements to furnish transit facilities and service; * * *
>
> (i) Contract for or employ any professional services; * * *
>
> (m) Exercise * * * all powers reasonably necessary or essential to the declared objects and purposes of this Title.

Section 4 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 904 (1976)) provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905 (1976)) provides, in part:

> (a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all the liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law * * * on account of such injury or death * * *.

District of Columbia Code § 36-501 (1973) provides:

> The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1).

STATEMENT

A. Introduction.

The central issue in each of these seven cases, consolidated on appeal before the United States Court of Appeals for the District of Columbia Circuit, is whether the Washington Metropolitan Area Transit Authority ("WMATA") is entitled to the immunity from employee suits guaranteed to the sole workers' compensation provider by every workers' compensation act ever adopted in this Nation. That issue arises in a context in which the facts material to this Petition, as found by five separate District Court judges and as acknowledged by the Court of Appeals, are not in dispute. The only issues are pure questions of law. They concern the interpretation of two provisions of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 904 and 905(a), that have remained unchanged since their adoption in 1927. They have been incorporated into the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973),[1] as well as into several other federal laws.[2] And on those questions, the District Court and Court of Appeals judges have split 5-3 on the question of whether WMATA is entitled to that immunity.

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[1] Although a new District of Columbia statute went into effect on July 26, 1982 (Act of July 1, 1980, D.C. Law 3-77, 27 D.C.R. 2503), that Act adopts LHWCA Section 904(a) as Section 36-303(c) of the new District of Columbia Workers' Compensation Act.

[2] The LHWCA is also applicable to (a) employees on defense bases (Act of Aug. 16, 1941, ch. 357, § 1, 55 Stat. 622 (codified as amended at 42 U.S.C. §§ 1651-1654)); (b) employees of nonappropriated fund instrumentalities, such as post exchanges (Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8171-8173)); (c) employees of government contractors injured overseas by war-risk hazards (Act of Dec. 2, 1942, ch. 668, Title I, § 102, 56 Stat. 1031 (codified as amended at 42 U.S.C. § 1702)); and (d) workers on oil drilling rigs on the outer continental shelf (Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c)).

B. The WMATA Wrap-Up Program.

WMATA is an interstate agency created by the Washington Metropolitan Area Transit Authority Interstate Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966). In that Compact, the States of Maryland and Virginia, and the District of Columbia agreed, with Congressional approval, to construct and operate an interstate rapid transit system, colloquially known as the Metro. Furthermore, that Compact authorized WMATA, as the interstate agency of each signatory, to construct and operate the system, as well as to delegate or subcontract portions of that project to others. WMATA Compact §§ 2, 4, 12. In carrying out that mandate, as every court below found, WMATA alone purchased the workers' compensation coverage for all Metro construction laborers required by the LHWCA under one comprehensive, "wrap-up" insurance program, typical of those now universally used in massive construction projects. As discussed below, WMATA did so because its experience had proved, and the insurance industry had made clear, that only WMATA could provide continuous protection for all construction laborers.

C. The Proceedings Below.

Each of the plaintiffs[3] was a construction laborer hired by one of the various subcontractors with whom WMATA had contracted to build the Metro transit system. Prior to filing these suits, each plaintiff had filed a compensation claim against the insurance purchased by WMATA for injuries sustained while working as a Metro construction laborer, and several had already received sizeable compensation awards (*e.g.*, $120,000).[4] In these suits,

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[3] In three of the cases, both the laborer and his wife filed suit. Because an employee's spouse may not bring suit where the employee himself is barred (33 U.S.C. § 905(a); *see, e.g., Hilton* v. *Fifteen Hundred Massachusetts Ave., Inc.*, 261 F.2d 377, 378 (D.C. Cir. 1958)), we will refer to the laborers alone as plaintiffs.

[4] Every plaintiff has now recovered a compensation award (App. 42a).

each plaintiff sought to supplement that award by also recovering tort damages from WMATA for the same injuries.[5] In each case, WMATA moved for summary judgment on the ground, *inter alia*, that it was immune from suit under LHWCA Sections 904 and 905(a).

D. The District Courts' Decisions.

Each of the five District Court judges (Smith, Richey, Flannery, Corcoran, & June Green, JJ.) granted WMATA's motion for summary judgment, ruling that WMATA was immune from suit under Section 905(a) (App. 1a-31a). Each judge found that WMATA was the general contractor for the Metro transit system.[6] Furthermore, these judges all found that WMATA, rather than any of the subcontractors, had purchased the workers' compensation insurance that had funded the compensation awards to the individual plaintiffs.[7] Based upon those findings, each District Court judge ruled that WMATA was entitled to the immunity from employee suits granted to every compensation provider by Sections

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[5] The plaintiffs also sued WMATA's agents, Bechtel Associates Professional Corporation, D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel"). The Court of Appeals affirmed the District Courts' dismissals of the suits against Bechtel on the ground that Bechtel was immune from suit under Section 80 of the WMATA Interstate Compact as WMATA's agents (*see* App. 43a-49a).

[6] For instance, Judge Green found that "WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors" (App. 1a).

[7] For instance, Judge Corcoran found that "[h]ere by agreement with its subcontractors, the general contractor, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits" (App. 10a). To the same effect are App. 1a-2a, 7a, 14a.

904 and 905(a).[8] Judge Flannery's conclusion in this regard is typical of the uniform rulings by the District Court judges:

> Under the WMATA Compact, WMATA clearly fulfills the function of overall general contractor of the rapid transit system, and, as purchaser of workers' compensation insurance, is entitled to statutory immunity from suit. [App. 28a-29a; *see also id.* 2a, 10a, 16a, 21a, 24a-25a.]

E. The Court of Appeals' Decision.

The Court of Appeals reversed. At the outset, the court accepted the crucial factual findings made by each District Court Judge. The Court of Appeals acknowledged that (a) "WMATA exercises the ultimate control of and authority for the construction and operation of the subway system" (App. 42a); (b) the injured employees "were employed by construction companies under contract to WMATA to construct specific segments of the Metro project" (*id.* 49a); (c) "[t]hese subcontractors did *not* purchase workmen's compensation insurance for their employees" (*id.* 49a-50a; emphasis in original); (d) "WMATA purchased such insurance to cover all laborers and other employees working on the Metro system" (*id.* 50a); and (e) "[a]fter sustaining an injury, each employee filed for and received workmen's compensation benefits" (*id.*). Nonetheless, the Court of Appeals ruled that WMATA was not entitled to immunity from suit under Section 905(a) of the LHWCA because WMATA, before itself obtaining that insurance, had failed to await the subcontractors' inability to obtain workers' compensation coverage for Metro laborers, or the default of the subcontractors or their insurance carriers (*id.* 51a-57a).

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[8] As Judge Corcoran ruled, "[i]t has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905(a) from common law liability" (App. 9a; citations omitted).

The Court of Appeals ruled that "the overall purpose and design of the Longshoremen's Act" was to construe the Act " 'liberally in favor of the injured employee' " so as to assure that an injured employee would not be deprived of either his compensation or his claim in damages against third parties' " (*id.* 51a). The court concluded that "[t]o accord WMATA section 905 employer immunity would frustrate the operation of the Act" (*id.* 54a). The court interpreted Section 904 of the Act to require a subcontractor to obtain workers' compensation insurance, and "[t]he general contractor is not obligated to obtain insurance 'unless' the subcontractor fails to do so" (*id.* 52a). The court purported to buttress that interpretation by relying upon three prior decisions denying a contractor immunity when *both* the contractor *and* the subcontractor had purchased workers' compensation insurance, or when the subcontractor *alone* had done so (*id.* 52a-54a). The court concluded that "[t]o benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance" and "only by providing compensation insurance *when the subcontractors fail to do so* [may] WMATA obtai[n] immunity as a statutory employer" (*id.* 54a-55a; emphasis in original).[9]

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

WMATA opposed the construction of the LHWCA adopted by the Court of Appeals before the District Court and the Court of Appeals, and all courts below specifi-

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[9] Notwithstanding the Court of Appeals' affirmation of the uniform finding in the District Court that "[t]hese subcontractors did *not* purchase workmen's compensation insurance for their employees" (App. 49a-50a; emphasis in original), the court wrote that "[w]e express no opinion on the issue whether the *subcontractors* have 'secure[d]' compensation insurance under Section 904(a) and would thereby be entitled to immunity" (App. 56a n.16; emphasis in original).

cally ruled upon the issues raised in this Petition (App. 1a-31a; 49a-57a).

REASONS FOR GRANTING THE PETITION

Central to every workers' compensation program enacted throughout this century has been a compromise between the interests of employers and employees. In this compromise, employers relinquished their defenses to common law tort actions in exchange for absolute but limited liability to their employees, and immunity from employees' suits for employment-related injuries. *See, e.g., Morrison-Knudsen Constr. Co.* v. *Director*, 103 S. Ct. 2045, 2052 (1983); *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268, 281-282 (1980) (*"Pepco"*); *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 476 (1947).

The decision below rejects that principle. The court denied to the sole compensation provider the immunity from employee suits historically recognized as an integral component of any workers' compensation program, and explicitly provided for by Section 904 and 905(a) of the LHWCA. Accordingly, that decision stands in derogation of this Court's decisions in *Morrison-Knudsen*, *Pepco*, and *Cardillo*. In addition, for the fourth time in almost as many years, and contrary to the straightforward language of Sections 4 and 5(a) of the original Act (33 U.S.C. § 904 and 905(a)), the District of Columbia Circuit has superimposed upon employers covered under the LHWCA additional burdens that are nowhere found in the plain language of the Act, or suggested by the Act's legislative history and underlying purposes.[10] For each of these reasons, the construction of the LHWCA adopted

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[10] *See also Hilyer* v. *Morrison-Knudsen Constr. Co.*, 670 F.2d 208 (D.C. Cir. 1981), *rev'd sub nom. Morrison-Knudsen Constr. Co.* v. *Director*, 103 S. Ct. 2045 (1983); *Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980), *rev'd sub nom. U.S. Industries/Federal Sheet Metal, Inc.* v. *Director*, 455 U.S. 608 (1982); *Potomac Electric Power Co.* v. *Director*, 606 F.2d 1324 (D.C. Cir. 1979), *rev'd*, 449 U.S. 268 (1980).

by the Court of Appeals is so plainly in error as to warrant this Court's summary disposition of the case.

1. The Plain Language of the Statute.

Any inquiry must begin with the plain language of the statute and the reason why workers' compensation programs were adopted. *See, e.g., Pepco*, 449 U.S. at 273-274, 281-282 & n.24. These programs struck a balance between the interests of employers and employees to prevent employees or their dependents from succumbing to accident-induced destitution. Employers relinquished their tort defenses in exchange for limited and predictable liability, while employees obtained certain but limited compensation awards.[11] Congress incorporated these principles into both the LHWCA [12] and the District of Columbia Workmen's Compensation Act.[13] "[T]he concept of compromise is central to the LHWCA, as adopted by the District of Columbia Workmen's Compensation Act." *Pepco*, 449 U.S. at 282 n.24; *see Cardillo*, 330 U.S. at 476.

The applicable provisions effectuating that compromise, 33 U.S.C. §§ 904 and 905(a) (Sections 4 and 5 of the original Act [14]), are the centerpiece of the LHWCA, as

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[11] *See, e.g., New York Central R.R. Co.* v. *White*, 243 U.S. 188, 201-204 (1917); J. Boyd, *A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* § 4 (1913); 1 A. Larson, *The Law of Workmen's Compensation* § 2.10 (1982).

[12] *See, e.g.*, H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927); S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926); *Morrison-Knudsen*, 103 S. Ct. at 2052.

[13] *See, e.g.*, Act of May 17, 1928, ch. 612, § 1, 45 Stat. 600; H.R. Rep. No. 1422, 70th Cong., 1st Sess. 1-2 (1928); H.R. Rep. No. 1357, 70th Cong., 1st Sess. 1-2 (1928); S. Rep. No. 852, 70th Cong., 1st Sess. 1-3 (1928); *Pepco*, 449 U.S. at 281-282 & n.24; *Cardillo*, 330 U.S. at 476.

[14] Current Section 905(a) of the LHWCA is the only subdivision of Section 905 applicable here. Congress adopted the District of

incorporated by Congress into the law of the District of Columbia. The first sentence of Section 904(a) requires "[e]very employer" governed by the Act to obtain workers' compensation insurance for its employees, and also makes those same employers liable for the compensation payments specified elsewhere in the Act. Section 904(b) then makes the liability for compensation absolute, and Section 905(a), in turn, makes this liability "exclusive and in place of all other liability of such employer to the employee * * *." Where the "employer" is a "subcontractor," however, Congress imposed a different set of obligations. In that situation, the second sentence of Section 904 provides that "the *contractor* shall be liable for and shall secure the payment of such compensation * * * *unless* the subcontractor *has secured* such payment" (emphasis added). In other words, the second sentence of Section 904(a) substitutes the contractor for the employer-subcontractor with respect to the obligations imposed by that provision.

Under the plain language of Section 904(a), therefore, a contractor is obligated to purchase workers' compensation insurance and to make the statutory compensation payments. The only exception obtains where a subcontractor has relieved WMATA of this obligation by itself

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Columbia Workmen's Compensation Act in 1928, and incorporated into that law the then-existing provisions (as modified) of the LHWCA. *See* Act of May 17, 1928, ch. 612, 45 Stat. 600. Section 905(a) was originally enacted in 1927 as Section 5 of the original LHWCA (44 Stat. 1526), whereas Section 905(b) was not enacted until 1972. Therefore, Congress could not have adopted Section 905(b) as part of the 1928 District of Columbia Workmen's Compensation Act. Because it is the District of Columbia version of the LHWCA that is at issue here, D.C. Code § 36-501 (1973) provides the governing law, and that provision does not incorporate LHWCA Section 905(b).

In addition, the text and legislative history of Section 905(b) make clear that it is limited to a maritime context. *See* H.R. Rep. No. 1441, 92d Cong., 2d Sess. 4-8, 22 (1972); *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 103 S. Ct. 2541, 2547-48 & n.7 (1983).

obtaining workers' compensation insurance, a situation which *every* court below agreed is not present here. The construction of Section 904(a) adopted by the Court of Appeals—characterizing WMATA's obligation "as *"secondary"* and its subcontractors' obligations as "primary" —is irreconcilable with the literal language of that section. That section clearly states that, where the employer is a subcontractor, "the *contractor* shall be liable for and shall secure the payment of * * * compensation" (emphasis added), thereby squarely imposing upon contractors the statutory duty to provide compensation. In so doing, that section plainly supplants any duty subcontractors would otherwise have as "employers" under the first sentence of Section 904(a). Furthermore, because the contractor is relieved of his statutory duty only where a subcontractor "has secured" compensation payments, the mere possibility that a subcontractor could have obtained compensation insurance is of no consequence. A contractor has a continuing duty to obtain compensation insurance, and a subcontractor, by contrast, has no duty *at all* to obtain such insurance.

Therefore, because a contractor fills the role of a subcontractor-employer with respect to the obligations imposed by Section 904(a), that contractor should also naturally receive the immunity to which a subcontractor-employer would otherwise be entitled under Section 905(a). By providing compensation, the contractor becomes entitled to the immunity Congress and this Court have recognized to be "central" to the bargain struck in the LHWCA. *Pepco*, 449 U.S. at 282 n.24. Otherwise, Section 904(a) would skew the compromise by imposing the compensation burden upon contractors without providing them with the benefit of immunity. That Congress did not reiterate the term "contractor" in Section 905(a) is immaterial in this regard. Because Section 904(a) substitutes the "contractor" for the subcontractor-"employer" whose liability is absolute under Section 904(b), the term "employer" contained in Section 905(a) is itself sufficient

to encompass a "contractor" where that contractor has shouldered the duty of obtaining compensation for employees. The federal regulations implementing the LHWCA define the term "employer" as used in the Act to include "*any* employer who may be obligated as an employer under the provisions of the LHWCA as amended or any of its extensions [*e.g.*, D.C. Workers' Compensation Act] to pay and secure compensation as provided therein." 20 C.F.R. § 701.301(a)(13) (1982) (emphasis added.) This definition clearly indicates that it is the obligation to pay and secure compensation that determines who is an "employer" subject to the Act, not whether one is an immediate employer or, as in WMATA's case, an employer one step removed. The contrary interpretation would attribute to Congress a failure to recognize the effect of Section 904(a) with respect to contractors and an accompaying intent to nullify, solely for contractors, the effect of the compromise that Sections 904 and 905(a) embody.[15] Hence, only by construing Section 905(a) to award immunity to contractors can the otherwise conflicting provisions of Section 904 and 905(a) be reconciled. *Cf., e.g., Pfeifer*, 103 S. Ct. at 2546-47.

The Court of Appeals, therefore, has simply rewritten, rather than interpret, the LHWCA to state, in effect:

> The contractor has a secondary liability for compensation benefits; it shall first compel subcontractors to secure the payment of such benefits. If the subcontractor fails to secure such payment, then and only then is the contractor required to secure payment of such benefits.

If Congress had intended to impose such a two-step process, surely it would have said so somewhere in the lan-

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[15] WMATA's wrap-up program was brought to Congress's attention at least 10 years ago and evoked no adverse comment or reaction. In fact, the hearing resulted in the continued funding of the entire WMATA project, including its wrap-up program. *E.g.*, Hearings before Sub. of House Comm. on Appropriations, 92d Cong., 2d Sess., 408, 417-419 (Mar. 20, 1972).

guage of Section 904(a). Other legislatures have expressly imposed such a two-step process in the plain language of their statutes when they so intended. For example, the Nebraska workers' compensation law provides that a contractor is not liable for compensation benefits if it "requires the contractor or subcontractor * * * to procure a policy [of insurance]." Neb. Rev. Stat. § 48-116 (1978); *see also* Ind. Code Ann. § 22-3-2-14 (Burns 1974); N.C. Gen. Stat. § 97-10.1 (1979 repl. vol.). Accordingly, it would have been quite simple for Congress to have drafted the two-step scheme set forth in the Court of Appeals opinion. Congress did not do so, however, and the federal courts may not superimpose additional requirements for immunity atop those Congress has written into the statute. *Cf. Director* v. *Rasmussen*, 440 U.S. 29, 46-47 (1979).

2. Legislative History.

Nothing in the legislative history of either the LHWCA or District of Columbia Workmen's Compensation Act suggests that Congress intended to impose upon contractors the additional obligation created by the Court of Appeals. Hence, the statutory language is controlling. *See, e.g., Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). But even if that language were not conclusive—which it is—the available evidence of Congressional intent as well as the policies underlying the Acts support the literal meaning of Sections 904 and 905(a).

The original New York Compensation Act, and the British Compensation Act of 1906, upon which the New York Act was based, provided that the principal was liable for compensation to a contractor's and subcontractor's employees and was also thereby entitled to immunity from suit by those employees. *See* J. Boyd, *A Treatise on the Law of Compensation for Injuries to Workmen Under Modern Industrial Statutes* § 56, at 90-91 (1913) (reprinting New York Act); *id.* § 577, at 1140 (reprint-

ing British Act); *see also* 1922 N.Y. Laws ch. 615, § 56 (requiring contractors in hazardous employment to secure workers' compensation for subcontractors' employees unless subcontractor has secured compensation). Because the LHWCA was based upon the New York Act (*Pepco*, 449 U.S. at 275), it is fair to presume that Congress intended Sections 904 and 905(a) to incorporate both the obligations and benefits contained in the model New York and British Acts. Moreover, the principles underlying the LHWCA and District of Columbia Act were drawn from the then-existing workers' compensation systems extant throughout the States, and under many of those acts a principal was liable for compensation to the employees of its contractors and subcontractors. H. Bradbury, *Workers' Compensation Law* 264 (3d ed. 1917). At the same time, in the "'contemporary legal context'" prevailing when Congress adopted these Acts (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982)), not only was the *quid pro quo* nature of workers' compensation legislation universally accepted, but this Court had even suggested that it was constitutionally required. *See, e.g., New York Central R.R. Co.* v. *White*, 243 U.S. at 201-202.

The Court of Appeals' construction of the Act also undermines two fundamental purposes thereof. On the one hand, employees are put at risk of being left without *any* compensation coverage, because until the subcontractor obtains coverage to satisfy its supposedly "primary" obligation, there is no coverage *at all* for employees. Furthermore, because subcontractors or their insurance carriers often default upon their obligation (which history had proven to be the case here, and which is the apparent reason Congress structured Section 904(a) in the manner it is written), construction laborers would often be left without any coverage during their lapses. Congress plainly intended to prevent that result, however, by requiring the contractor to obtain coverage unless a sub-

contractor "has secured" its own insurance, thereby assuring that no such gap could occur.

On the other hand, the decision below completely robs WMATA of any benefit of the margin struck by Congress. The Court of Appeals acknowledged that WMATA had in fact purchased such insurance and had also paid each plaintiff his statutory compensation award. In these circumstances, denying WMATA immunity from later suits by these employees effectively converts the LHWCA from a compensation program into a life and disability insurance plan, a form hitherto alien to workers' compensation law.[16] Nothing in the legislative history of the LHWCA suggests that Congress intended any such anomalous result.

3. Anamolous Results.

The decision below will necessarily lead to several additional anamolous results that Congress plainly never intended, and that will frustrate a general contractor's ability effectively to fulfill its obligations under the LHWCA. That decision, moreover, will potentially nullify WMATA's attempt to satisfy its affirmative action obligations under other provisions of federal or District of Columbia law. These incongruous results demonstrate the need to give the plain language of the Act its literal meaning and highlight the error in the interpretation below. Unless this Court reverses, the consequences of the Court of Appeals' construction threaten to eviscerate the socially-beneficial effects of wrap-up insurance programs generally, as well as WMATA's ability to operate the Metro interstate transit system in a fiscally-sound manner.[17]

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[16] *See U.S. Industries/Federal Sheet Metal, Inc.* v. *Director*, 455 U.S. 608, 615-616 n.10 (1982) ("[w]orkmen's compensation legislation has never been intended to provide life or disability insurance for covered employees").

[17] The Court of Appeals theorized, without any factual support, that such programs may not maximize a covered subcontractor's

(a) The Court of Appeals' decision creates a conflict between the law of the District of Columbia and that of Maryland and Virginia, the other two signatories to the WMATA Interstate Compact. Both Maryland and Virginia clearly bar suit against a general contractor in circumstances like those present here.[18] The decision below therefore has the anamolous effect of denying WMATA immunity *only* in the District of Columbia. That result is intolerable for an interstate agency like WMATA for whom uniformity in the applicable law is essential.

(b) The immediate impact of the decision below will be to render WMATA vulnerable to thousands of tort suits for past and future claims arising out of the operation of the Metro transit system. Since July 31, 1972, over 22,000 compensation claims have been filed against WMATA by construction laborers for injuries allegedly sustained in the construction of the still-incomplete Metro, resulting in a total of $112 million in compensation payments. Many, if not most, of these claims can even now serve as a predicate for a tort suit against

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incentive to maintain a safe work place. But there are many incentives for safety other than the direct payment of insurance premiums. For example, federal and state regulations, employer-employee relations, union demands, contractual obligations, the company's reputation, and numerous other factors motivate a company to maintain a safe work place. The court ignored the fact that WMATA, the party who pays the premiums, could and would shut down any unsafe operations and that an unsafe work record is an adequate ground for contract cancellation. Moreover, when the Insurance Buyers' Council conducted a wrap-up study for the General Services Administration in 1975, it concluded that "safety" was one of the very reasons for *recommending* that wrap-up insurance be provided for larger and more hazardous construction projects. "Wrap-up Study," Insurance Buyers' Council, Inc., submitted to Gen. Serv. Admin. (August 22, 1975), at 17, 32.

[18] *See, e.g.*, Md. Code Ann. art. 101 § 62 (Michie 1979); *State ex rel. Reynolds* v. *City of Baltimore*, 86 A.2d 618 (Md. 1952); Va. Code Ann. § 65.1-30 (1980); *Evans* v. *Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966).

WMATA. At present, over 95% of all compensation claims are resolved through the administrative process without resort to either administrative or judicial litigation of compensation claims.[19] Hence, a claimant can bring suit against WMATA, even after a decade has passed, on any claim that did not result in "an award in a compensation order filed by the deputy commissioner or [Benefits Review] Board." 33 U.S.C. § 933(b); *see Pallas Shipping Agency, Ltd.* v. *Duris*, 103 S. Ct. 1991, 1994-96 (1983).[20] Because compensation awards are usually limited to two-thirds of a worker's average weekly wages (33 U.S.C. § 910), WMATA's liability for past claims alone could well run into the millions of dollars. Moreover, because WMATA, like any governmental entity, is subject to repeated suits as a fact of life, WMATA's potential future liability dwarfs its potential retroactive liability.

(c) As explained more fully below (pp. 22-23), the result in this case will also effectively price minority contractors out of any opportunity to participate in the further construction or continued operation of the Metro interstate transit system—an intent hardly evisioned by Congress and one, in fact, that flies in the face of Congressional policy expressed in other statutes.

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[19] *See Morrison-Knudsen*, 103 S. Ct. at 2052; Report by the Comptroller General of the United States, *Longshoremen's and Harbor Workers' Compensation Act Needs Amending* 31, 41 (Apr. 1982).

[20] The District of Columbia applies the so-called discovery rule to determine the commencement of the statutory limitations period. *See, e.g., Fearson* v. *Johns-Manville Sales Corp.*, 525 F. Supp. 671 (D.D.C. 1981) (limitation period does not begin to run until the plaintiff knows or should have known about his specific injury and its cause.) Under that rule a plaintiff who has made a compensation claim for lung injury, in general, will be able to claim that the limitations period for a negligence action for silicosis or some other particular lung condition does not commence until he receives a specific diagnosis of that injury.

4. "Liberal Construction."

The Court of Appeals invoked the doctrine of liberal construction, quoting its earlier decision in *Potomac Elect. Power Co.* v. *Wynn*, 343 F.2d 295, 296 (1964): "'Narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties'" (App. 51a). The Court of Appeals failed to note, however, that this Court had unequivocally overruled *Wynn* more than two years ago. *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 614-617 (1981).[21]

Even more to the point, the Court of Appeals' statement stands the doctrine of liberal construction on its head and uses it to produce the exact opposite of its true purpose. This is because a "liberal" construction for the benefit of the employee in a tort suit against an employer produces the narrowest possible concept of "employer," which thereafter controls *all compensation claims*. While doing a favor for the employee-plaintiff who happens to be before the court in a tort suit, the court has diminished the compensation rights of a far greater number of workers who in the future will be deprived of the income and medical benefits they need to survive, because the fewer the number of "employers," the less compensation will be provided.[22]

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[21] Inexplicably, the Court of Appeals acknowledged that this Court's decision in *Rodriguez* was controlling with respect to another issue discussed below (*see* App. 60a-64a), but wholly failed to recognize that *Rodriguez* had overruled *Wynn* (see App. 51a (relying upon *Wynn* without even citing *Rodriguez*)). That failure itself justifies this Court's exercise of its supervisory power to vacate the judgment below for reconsideration in light of *Rodriguez*. *Cf., e.g., United States* v. *Hastings*, 103 S. Ct. 1974, 1982 (1983) (Blackmun, J.).

[22] We need look no further than respondents' brief below to find the most spectacular illustration of what happens when liberal construction is given full play in this type of tort case. Their first and principle argument was that WMATA was not a statutory employer

Some courts have become so tort-minded that they have forgotten the basic purpose of the act: to provide assured compensation protection in all cases. Dazzled by a few dramatic recoveries, they overlook the far more numerous everyday injuries for which no tort suit against the general contractor will lie—heart attacks, back injuries, inevitable accidents, injuries due to the negligence of other independent contractors or their employees, not to mention injuries due to the claimants' own negligence.

This same emphasis upon tort recovery is visible in the Court of Appeals' treatment of Section 904 as if it were part of an overall "statutory scheme" to provide tort recoveries to employees. Section 904 does not contain a word about tort liability.[23] It deals exclusively with compensation liability and insurance. The court stated that WMATA's wrap-up insurance would "frustrate the operation of the Act" as if the Act were designed to provide tort recovery. But the "operation of the Act" is to provide assured compensation benefits—promptly, efficiently, and without dispute. Why, once a claimant has received everything the Act can provide, is the Act frustrated because the particular party who has already paid that compensation cannot also be saddled with tort liability?

5. The Unmanageability of the Result Below.

Actual experience demonstrates that the system of insurance insisted upon by the Court of Appeals simply

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at all under Section 904 (pp. 1-22). If this argument had succeeded, WMATA would have had no compensation liability, and no statutory obligation to see that its subcontractors were insured. In a typical injury to an employee of an uninsured subcontractor that was not due to WMATA's negligence, the employee would have been completely without remedy.

[23] To the contrary, Congress intended "to minimize the need for litigation as a means of providing compensation for injured workers." *Rodriguez*, 451 U.S. at 616; *Bloomer* v. *Liberty Mut. Ins. Co.*, 445 U.S. 74, 86 (1980).

cannot work, even if it were required by the Act—which it is not. Prior to 1971, subcontractors working on Metro purchased their own compensation insurance.[24] In order to meet its Section 904 obligation, WMATA attempted to monitor literally hundreds of subcontractors and insurance programs.[25] WMATA, however, could not ascertain at any specific time whether all subcontractors maintained their compensation insurance in full force and effect (Ison Tr. at 68, 102-103). Some contractors were submitting their world-wide corporate policies as being in compliance with the contract requirements. But these policies often did not supply the required coverages, because the limits were not sufficient to contain the contractor's losses at all locations. In addition, substandard insurance companies unfortunately do exist, and a number of contractors used them. At various times and for various reasons, the policies of certain subcontractors lapsed or were dropped (*id.* at 68, 70-71). In fact, approximately 50% of WMATA's *prime* contractors were cancelled by their insurance carriers.

Moreover, there was the practical impossibility of finding an insurance carrier or group of carriers that would commit itself to providing individual coverage for the hundreds of subcontractors and sub-subcontractors (*id.* at 104-105). The insurance industry had made clear that it was (and still is) unwilling to provide separate coverage (up to the required $50 million limit) for hundreds of individual contractors who are subject to common risks in one narrow geographical area (*id.* at 105). The prob-

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[24] Deposition of Delmer Ison, WMATA's Secretary, Transcript at 65 (hereinafter "Ison Tr."). The transcript of Mr. Ison's testimony was included in Appellants' Record Excerpts filed with the Court of Appeals, but the pages in the Record Excerpts were not sequentially numbered.

[25] *Id.* at 67-69, 102-103. During the latter part of the 1970's, construction contracts required at least 600 different insurance programs and a minimum of 1800 separate insurance policies.

lem is not unique to WMATA: every subway construction project in the Nation has had to implement a single wrap-up program (*id.*). Accordingly, the Court of Appeals' decision denies WMATA immunity because WMATA did not demand that the subcontractors obtain coverage that WMATA knew was not available for *all* the subcontractors.

What can happen to an employer whose subcontractor, unbeknownst to the employer, fails to maintain the proper insurance coverage is illustrated by *Fiore* v. *Royal Painting Co.*, 398 So. 2d 863, 864 (Fla. Dist. Ct. App. 1981). There, the unwitting employer, even though it attempted to remedy the situation with compensation payments, was also subjected to common law liability. It was precisely this type of situation that WMATA attempted to avoid here. If an employer simply relies on the good faith or assurances of his subcontractor, he is taking serious risks. This, after all, is a criminal statute. Section 38(a) provides criminal penalties for any employer, including officers of a corporation, who fail to secure the payment of compensation required by the Act (33 U.S.C. § 938), and, as pointed out above, WMATA may well be treated as an employer for purposes of this Act.

There is a further, extremely important, point. WMATA is required by law to hire a certain percentage of minority-run companies (Ison Tr. at 104). Yet these companies and other smaller companies were often unable to obtain compensation insurance at competitive rates or from established, dependable firms. Consequently, these companies either could not make successful bids for WMATA projects or had to obtain coverage from unreliable, "fly-by-night" insurance companies (*id.* at 103-104). Later, these subcontractors were able to participate in the construction of the Metro only because WMATA, through its wrap-up program, was itself able to secure the workers' compensation insurance for Metro construction laborers required by the LHWCA. Perhaps for this reason, the Department of Transportation in 1977 rec-

ommended that mass transit systems "provid[e] wrap-up insurance for contractors and subcontractors" to enable minority businesses to participate in such projects. Urban Mass Transportation Administration, Department of Transportation, Circular C 1165.1 (December 30, 1977), at 14. The decision below not only defeats this recommendation but in the process makes it impossible, in some instances, for WMATA to fulfill its statutory obligation to hire the required percentage of minority-operated companies.

In addition to these practical considerations is the simple fact that the wrap-up provides many significant advantages to workers, insurers, employees and the public that cannot be duplicated by any other type of insurance.[26]

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[26] Among its many advantages, as detailed in the many articles on this subject (*see, e.g.*, page 24 note 27 *infra*):

Administration. Since all contractors have the same coverage, limits, and policy terms, there is no necessity to review many policies for each construction contract to make certain that coverages afforded are in compliance with contract requirements.

Claim Handling. Since the same insurance carrier and staff adjust all claims, this assures a constant uniformity of claims handling for the entire project and eliminates the inconsistencies that would prevail if there were more than one carrier.

Loss Control Engineering. Loss prevention and inspection services are also subject to uniformity because one company supplies the service. This eliminates the variable approach that would be used under conventional methods.

Duplication of Insurance Costs. Only one premium is charged to cover all prime and subcontractors. The alternative would require these contractors, regardless of tier, to supply their own coverages, thus pyramiding insurance costs.

Elimination of Cross-Liability Litigation. The interfacing of one project with another often generates claims by one contractor against another—an expense which carriers anticipate and include in their premiums. This is avoided in the wrap-up program.

Avoidance of Construction Delays. The availability of insurance varies from day to day, and its cancellation, either before or at renewal dates, is always a possibility. If a contractor cannot obtain the coverage required by contract or by law, the construction work

6. The Importance of "Wrap-Up" Insurance and of the Case.

The decision below threatens to throttle an insurance program of relatively recent origin that has successfully met a serious, nationwide need. Wrap-up programs did not even come into widespread use until after World War II, and the first wrap-up accepted by a quasi-federal agency was not adopted until twenty years later. Becker & Denenberg, "Wrap-Up of the Wrap-Up," The CPCU Annals, September 1967, at 200 (hereinafter "Becker & Denenberg"). Over ten years later, an extensive study commissioned by the United States Department of Transportation concluded that transit "[p]rograms and projects of a size greater than $60,000,000 should be CIP's [wrap-ups]." Barrett, "Insurance for Urban Transportation Construction" at 6-1 (Dept. of Com. 1977) (hereinafter "Barrett").[27] Perhaps this is why wrap-up in-

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must stop. This possibility is eliminated under the wrap-up approach.

Participation by Small and Minority Contractors. As pointed out above, coverage for the majority of these contractors is either not available or is so expensive that it would preclude their participation in the project. The wrap-up program not only provides them an opportunity to participate but assists them in developing greater construction expertise.

Costs. The wrap-up program is primarily loss responsive. That is, each dollar of claim requires a dollar of premium. Charges for the insurance company's expenses and profit have been eliminated. Thus, virtually all premium dollars are used for claim payments.

Thus, in addition to meeting WMATA's Section 904 duty, wrap-up insurance substantially lessens WMATA's administrative burden and effectuates a substantial savings in costs (Ison Tr. at 69, 104). It frees WMATA's officials to perform other public duties, and it lessens the cost to the public of constructing the system—costs that will not be recaptured by future profits (*id.* at 114).

[27] Other studies have reached a similar conclusion. For example, an in-depth discussion of wrap-up insurance by the General Counsel of the John F. Kennedy Center for the Performing Arts and an Associate Professor of Insurance at the University of Pennsylvania concluded that "the wrap-up is * * * a sound approach to insurance for large construction projects. * * * The wrap-up appears to be the best marketing method for many owners planning multi-million

surance has already been approved in one form or another for use in urban transportation construction by the legislatures in at least 23 states and the District of Columbia (Barrett, *supra*, at A-1 to A-4), and wrap-up programs are now common in large construction projects involving large numbers of contractors, subcontractors and sub-subcontractors (Ison Tr. at 105).

The ruling below is bound to have a strong, adverse impact on the development of this new trend in insurance coverage—all to the detriment of the worker as well as the employer. By failing to protect from tort liability the employer who obtains such insurance, the court has thrown in question the integrity of the wrap-up itself. Wherever a state statute or a contract imposes any insurance burden on a contractor or subcontractor on a large project, the decision below will be used to impose double liability on the general contractor who—in an attempt to make certain that every worker is fully covered —has sought out the wrap-up program as the only safe means of protecting everyone involved. Thus, the importance of the decision's adverse ripple effect throughout the construction and insurance industries can hardly be overstated. When this effect is added to the others already covered—the thwarting of the will of Congress, the impact on minority hiring, and the confusion, delay and uncertainty created in the enforcement of LHWCA compensation claims—it is clear that the case warrants not only review but summary disposition.

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dollar construction projects." Becker & Deneberg, *supra*, at 216. Similarly, a study commissioned by the General Services Administration on wrap-up insurance in 1975 concluded: "It is therefore our opinion that the wrap-up technique should be used under either of the following circumstances: (a) Construction projects over $20,000,000; or (b) Hazardous construction projects in populated areas." "Wrap-up Study," Insurance Buyers' Council, Inc., submitted to Gen. Serv. Admin. (August 22, 1975) at 17. *See also* Dudley, *Wrap-Up Programs Not for the Unsophisticated*, National Underwriter (May 20, 1983) at 36; Sullivan, *Casualty Insurance for Contractors*, The Constructor (April 1962) at 48; Westran, *Advantages of Wrap-Up Plans*, The CPCU Annals (Winter 1965) at 317-326.

CONCLUSION

To deny the party who has purchased workers' compensation insurance the benefit of immunity from employee suits that has historically gone hand-in-hand with the burden of paying for that insurance is, to say the least, judicially presumptuous. To do so by imposing upon the simple, straightforward language of the LHWCA a hitherto-unforeseen duty, nowhere suggested in the language, legislative history, or underlying policies of the Act, is to assume a role no federal court may discharge, much less on the basis of a lower court decision this Court has specifically and squarely overruled. For the foregoing reasons, we urge the Court to grant the petition and reverse the judgment below. Because of the Court of Appeals' disregard for the plain language of the LHWCA and this Court's precedents, the Court may wish to consider summary disposition.[28]

Respectfully submitted,

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[28] *See also* page 19 & note 21, *supra*.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Jul. 30, 1982]

MEMORANDUM OPINION

Washington Metropolitan Area Transit Authority (WMATA) paid workmen's compensation insurance for the plaintiff, Harold Eighmey. Mr. Eighmey received workmen's compensation for injuries sustained while working at the Tenley Circle subway construction site. The subcontractor which employed him did not carry workmen's compensation insurance. Hearings were held on July 15 and 26, 1982 to determine whether workmen's compensation law bars recovery against WMATA in this action.

I.

WMATA is in the position of overall general contractor for subway construction in the Washington, D.C. area, with the responsibility of supervising numerous consultants, general contractors, and subcontractors. Since 1971, WMATA has required all workmen's compensation claims by subway construction workers to be administered through its adjuster, the National Loss

Control Service Corporation, and all claims be paid by its carrier, Lumberman's Mutual Casualty Insurance Co.

The current District of Columbia workmen's compensation law, 1 D.C. Code § 501 *et seq.* (1973), adopts the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the Act). Section 4(a) of the Act, 33 U.S.C. § 904(a), states in relevant part:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation under (this Act). *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment* (emphasis supplied.)

In this case, the subcontractor has not secured payment of workmen's compensation. WMATA as the overall general contractor is thus liable for such payment and has in fact provided it. WMATA's provision of insurance makes it a statutory employer entitled to the exclusiveness of liability under section 5(a) of the Act, 33 U.S.C. § 905(a). Since WMATA as general contractor provided compensation, the subcontractors which employed plaintiff were not required to provide the same.

An additional factor contributes to the Court's determination. WMATA is a quasi-public authority involved in subway construction in Maryland, Virginia and the District of Columbia. It is in the public interest to construe WMATA's liability to suit consistently in all three jurisdictions wherever possible. Maryland and Virginia would undoubtedly bar suit against WMATA as the general contractor or owner. *See Evans v. Newport News Shipbuilding & Dry Dock Co.*, 361 F.2d 364 (4th Cir. 1966); Va. Code § 65.1-30 (1973); *State ex rel. Reynolds v. City of Baltimore*, 86 A.2d 618 (1952); Md. Ann. Code art. 101 § 62 (Michie 1964).

II.

The cases relied upon by plaintiff are inapposite to this case. Here, only the general contractor, and not the subcontractor, has paid workmen's compensation. In *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), the issue was whether a general contractor is the employer of the subcontractor's injured employee and thus immune from tort liability where the subcontractor had secured insurance and paid compensation to the employee. *Id.* at 672. The District of Columbia Court of Appeals held the general contractor who had not paid benefits subject to suit. Where both the general contractor and subcontractor carry workmen's compensation insurance, the general contractor acts in a supplementary and voluntary fashion, subjecting him to tort liability. *Thomas v. George Hyman Construction Co.*, 173 F.Supp. 81 (D.D.C. 1959). *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974), held the District of Columbia subject to suit by its contractor's employees who are injured in the performance of inherently dangerous work. In *Lindler*, the District employed a safety inspector to oversee construction of a watermain. In contrast to WMATA's contractual obligation here, there was no requirement for the District to pay workmen's compensation in the *Lindler* case; that the District as contractee ultimately bore the costs of such insurance was irrelevant. In *Probst v. Southern Stevedoring Company*, 379 F.2d 763, 767 (5th Cir. 1967), the Court left open the question answered here: what ought to be done when the general contractor or general employer is actually required to pay compensation benefits to the injured employee of the subcontractor?

Where, as here, WMATA is contractually obligated to pay workmen's compensation to its subcontractors' employees in place of any obligation of the subcontractor,

it becomes entitled to the exclusivity provisions of 33 U.S.C. § 905(a).

In accordance with the above, the Court dismisses WMATA as a defendant. Since no defendant remains, the Court dismisses this action without prejudice.

An appropriate order accompanies this opinion.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

July 30, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Jul. 30, 1982]

ORDER

For the reasons expressed in the accompanying memorandum opinion and upon consideration of the arguments of counsel at hearings on July 15 and 26, 1982, plaintiffs' memorandum of points and authorities, plaintiffs' motion to supplement the record and accompanying documents, and the entire record in this section, it is by the Court this 30th day of July 1982,

ORDERED that plaintiffs' motion to supplement the record is granted; it is further

ORDERED, *sua sponte*, that Washington Metropolitan Area Transit Authority (WMATA) is dismissed as a defendant in this action; and it is further

ORDERED, *sua sponte*, that this action is dismissed without prejudice.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0963

PAUL D. JOHNSON,
Plaintiff,

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants.

[Filed Aug. 24, 1982]

MEMORANDUM AND ORDER

Before the Court is the motion of the defendant Washington Area Transit Authority (WMATA)[1] for summary judgment. The plaintiff has opposed. WMATA contends that this action is barred by § 905(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* In the alternative, WMATA argues that the action is barred by the applicable statute of limitations. Upon consideration of the submissions of the parties, we conclude that § 905(a) forecloses this action. Accordingly, we do not reach the statute of limitations issues.

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[1] Plaintiff's original complaint named Bechtel Associates Professional Corporation, D.C. and Bechtel Civil and Minerals, Inc. (Bechtel) as defendants. On May 18, 1982, plaintiff was permitted to amend the complaint to add WMATA as an additional defendant. On July 21, 1982, the action against Bechtel was dismissed by Order of this Court, because in the view of this Court, § 80 of the WMATA Compact barred the action against it. *See Johnson v. Bechtel Associates Professional Corp., D.C.*, C.A. No. 81-968 (D.D.C. July 21, 1982).

I. BACKGROUND

In this action plaintiff seeks damages for injuries allegedly sustained while working as a hardrock miner on the WMATA subway project. He was employed in that capacity by several subcontractors, over a period of years beginning in 1968. The subcontractors for whom the plaintiff worked were hired to perform construction services on the subway project by WMATA, the general contractor.

The plaintiff's employers, as subcontractors, did not obtain workmen's compensation insurance applicable to him. Instead, under the terms of their contractual arrangement with WMATA, WMATA, the general contractor, obtained the only compensation insurance covering the plaintiff for the injuries complained of in this action. Plaintiff applied for and received workmen's compensation benefits for his injuries from WMATA's compensation program.

The LHWCA embodies a scheme under which employers are required to purchase workmen's compensation coverage for their employees in exchange for immunity from common law liability arising from their employee's injuries.

Section 904(a) mandates the purchase of workmen's compensation coverage. It provides:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. *In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.* (Emphasis supplied)

Section 905(a) articulates the grant of immunity. It provides:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

Having purchased the workmen's compensation coverage from which plaintiff collected his benefits, WMATA asserts § 905(a)'s grant of immunity as a bar to this action.

Plaintiff contends, however, that WMATA may not claim the immunity granted in § 905(a) because it voluntarily assumed the responsibility of securing workmen's compensation coverage. In its view, WMATA is a "third party" subject to suit under § 933 of the LHWCA.

Section 933(a) provides:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

WMATA contends that its motivation for purchasing compensation coverage is irrelevant. In its view, it secured the coverage, paid the benefits, and should be entitled to § 905(a)'s release from liability.

For the reasons stated below, we agree with the defendant that § 905(a) bars this action against WMATA.

II. DISCUSSION

It has long been recognized that the purchase of workmen's compensation coverage and the payment of benefits is the *quid pro quo* for the release under § 905(a) from common law liability. *Thomas v. George Hyman Construction Co.*, 173 F.Supp. 381, 383 (D.D.C. 1959); *Linder v. District of Columbia*, 502 F.2d 495, 499 (D.C. Cir. 1974); *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670, 672 (D.C. 1979). The party obligated by law to purchase the coverage is entitled to the § 905(a) grant of immunity. *Thomas v. George Hyman Construction Co.*, *supra* at 383. However, a party may not escape common law liability by securing workmen's compensation coverage not required by law. An employer may not voluntarily purchase compensation coverage and thereby benefit from § 905(a); for "release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so." *Id.* at 383; *See also DiNicola v. George Hyman Construction Co.*, *supra* at 673 (quoting *Thomas* with approval).

Thus, a general contractor may not assert § 905(a) as a bar to an action by an employee of his subcontractor, where only the subcontractor has purchased workmen's compensation coverage for the employee. *Linder v. District of Columbia*, *supra*; *DiNicola v. George Hyman Construction Co.*, *supra*. Nor may a general contractor claim immunity under § 905(a) where both he and the subcontractor have purchased compensation coverage for

the injured employee, *Thomas v. George Hyman Construction Co., supra*; *Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967), for in that situation, the coverage purchased by the general contractor merely supplements that required to be purchased by the subcontractor. Since the employee received no *quid pro quo* from the purchase of compensation coverage by the general contractor, the general contractor may not invoke the immunity granted in § 905. *Thomas v. George Hyman Construction Co., supra* at 383.

However, those cases are significantly different from the case before us. Here, by agreement with its subcontractors, the general contrator, WMATA, became the sole purchaser of workmen's compensation coverage; and it was from that coverage that the plaintiff received his benefits. This is precisely the situation left open by the *Probst* court. *Id.* at 767. Unlike the contractors in *Thomas*, *DiNicola* and *Probst*, the general contractor here has given a *quid pro quo* for release from common law liability, since it alone secured compensation coverage. In our view the general contractor here, WMATA, is entitled to immunity from damage suits in return for the purchase of workmen's compensation coverage. *See* 2A Larson, *Workmen's Compensation Law* § 72.31(a) at 14-112 (1982).

We recognize that there is some case law to the contrary. However, we decline to follow the "extreme" position of courts holding a general contractor liable for common law damages even where he alone purchased the applicable workmen's compensation coverage. *See Id.* § 72.31(c) at 14-135. We agree with Professor Larson that this "extraordinary" position deprives the general contractor of his *quid pro quo*, for he gets "nothing whatever in return" for his purchase of compensation coverage. *Id.* at 14-137.

As a final matter, plaintiff argues that the contractual arrangement between WMATA and its subcontrac-

tors, whereby WMATA assumed the obligation to purchase workmen's compensation coverage, is "null and void as against statutory provision and public policy", and therefore neither WMATA nor any of its subcontractors may claim the protection of § 905(a). We do not agree.

Whatever the validity of the contractual arrangement [2], the fact remains that plaintiff's immediate employer did not purchase workmen's compensation coverage for the plaintiff. Thus, WMATA was never relieved of its obligations, under § 904(a), to secure workmen's compensation coverage for the plaintiff. Since WMATA fulfilled that obligation, we believe that it is entitled to § 905(a)'s grant of immunity. *See Thomas v. George Hyman Construction Co., supra* at 383. ("general contractor may well be free of all other liability if he [alone] in fact carried such insurance.") This position

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[2] Arguably, the contract *may* contemplate a violation of law. Under § 938(a) of the LHWCA, "any employer required to secure" workmen's compensation coverage, who fails to secure such coverage, is guilty of a misdemeanor. Since WMATA's subcontractors were primarily responsible for securing workmen's compensation for their employees, *DiNicola v. George Hyman Construction Co., supra*, their abdication of that responsibility *may* violate § 938(a).

Nevertheless, we do not believe the contractual arrangement violates the public policy. The purpose of the LHWCA is to ensure workmen's compensation coverage for every employee. The WMATA contractual arrangement does just that—it guarantees that each employee will have compensation coverage since WMATA assumed the obligation of securing the coverage.

Nor does the contract limit the rights of a subcontractor's employee. Although an injured employee is barred from suing the general contractor (WMATA), absent the special protection of § 80 of the WMATA Compact (see f.n. 1 *supra*), the subcontractor's employee is free to bring a common law action against his immediate employer under § 905(a). *See Baldwin v. Wrecking Corp. of America*, 484 F.Supp. 185 (W.D.Va. 1979) (Under Virginia's compensation act, an insured employee may sue his employer, a subcontractor, even though he obtained workmen's compensation benefits under the general contractor's workmen's compensation coverage.

is consistent with the holding of at least one other court in this District. *See Eighmey v. Bechtel Associates Professional Corp.*, C.A. No. 81-1261 (D.D.C. July 30, 1982).

Accordingly, it is this 24th day of August, 1982

ORDERED that the motion of the defendant WMATA for summary judgment is hereby GRANTED, and that this action is hereby dismissed as to it.

/s/ Howard F. Corcoran
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN WARREN CLANAGAN,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Sep. 2, 1982]

MEMORANDUM OPINION OF UNITED STATES DISTRICT JUDGE CHARLES R. RICHEY

APPEARANCES

William H. Mulroney, James M. Hanny, and Michele A. Parfitt, *Asocraft & Gerel, Washington, D.C.* for *John Warren Clanagan.*

Vincent H. Cohen and Robert B. Cave, *Hogan & Hartson, Washington, D.C.* for *Washington Metropolitan Area Transit Authority.*

Before the Court is defendants' motion for summary judgment, plaintiff's opposition thereto, and the entire record herein, the Court having heard oral argument by both sides on this matter. Defendant here contends that it is immune from suit because it was obligated to purchase workers' compensation coverage for plaintiff and thus is entitled to the protection of § 905(a) of the Longshoremen's and Harbor Workers' Compensation Action, 33 U.S.C. § 905(a) (1976).[1] Plaintiff argues that de-

[1] This Act has been adopted by the District of Columbia as its workers' compensation law. D.C. Code § 36-501 (1973).

fendant should not be held immune because it was not obligated to purchase compensation coverage for plaintiff and because any arrangement by which defendant may have obtained immunity from this action is null and void as contrary to law. Upon careful consideration of these arguments, the Court holds that this action is barred by § 905(a) and, accordingly, should be dismissed.

FINDINGS OF FACT

Plaintiff in this action seeks damages for injuries sustained while working as a hard rock miner on the Metro subway project. At the time of his injuries, plaintiff worked for subcontractors performing construction services for defendant, the general contractor for the entire subway project. The subcontractors for whom he worked did not obtain workers' compensation insurance applicable to him.

Instead, defendant obtained insurance covering plaintiff. More precisely, the defendant required that all claims by workers on the Metro project be administered through its adjuster, the National Loss Control Service Corporation, and all claims be paid by its carrier, Lumberman's Mutual Casualty Insurance Co. Plaintiff applied for and received workers' compensation benefits for his injuries from defendant's carrier.

CONCLUSIONS OF LAW

I. *DEFENDANT IS IMMUNE BECAUSE IT WAS OBLIGATED TO INSURE PLAINTIFF UNDER § 904(a)*

On both sides, the parties to this action have argued that the entity that was obligated to purchase the workers' compensation coverage for plaintiff is entitled to the immunity under § 905(a). The parties disagree, however, as to who had that obligation—defendant, the general contractor for the Metro project, or the subcontrac-

tor, for whom plaintiff directly worked. On this question, the arguments by both sides rest on language from the same statutory provision, 33 U.S.C. § 904(a), which states:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Plaintiff argues from the first sentence of this provision that the subcontractor, and the subcontractor alone, had the obligation to purchase workers' compensation insurance for its employees. Plaintiff further relies on this sentence to suggest that the arrangement whereby the defendant took on the subcontractor's responsibility of purchasing compensation insurance is contrary to law. Only plaintiff's direct employer, he says, should have obtained the insurance.

Defendant argues from the second sentence of § 904 (a) that it was liable for purchasing workers' compensation for the employees of its subcontractor unless the subcontractor purchased the insurance itself. This sentence, defendant contends, puts the primary obligation on the general contractor, not the subcontractor, to purchase insurance. Defendant further argues that it would have been guilty of a misdemeanor under 33 U.S.C. § 938 (a) had it failed to purchase compensation insurance for plaintiff as it did.

The Court finds that the defendant has proffered the better interpretation. On its face, § 904(a) plainly contemplates that *either* the subcontractor or the general contractor obtain workers' compensation insurance. This language has been part of the Act since it was passed in 1927. *See* S. 3170, 69th Cong., 2d Sess. § 4, reprinted

at 68 *Cong. Rec.* 5404 (1972). It assures compensation coverage for workers performing for subcontractors: either the subcontractor picks up insurance for these workers or the general contractor must do so. The important thing is that the worker be insured.

Here, plaintiff *was* insured. By arrangement, the contractor and the subcontractor saw to it that there was compensation insurance that covered the plaintiff. Indeed, plaintiff has already received his compensation insurance award! Thus, the goal of the workers' compensation law has already been satisfied. As Congressman Firorella La Guardia stated at the time of the passage of the Act, workers' compensation seeks to "transfer from society and from the courts the expense of taking care of those injured in industry and transfer it to the industry itself." 68 *Cong. Rec.* 5412 (1927).

The position that plaintiff has urged on this Court is that defendant may be sued at common law even though it obtained the only insurance applicable to plaintiff and paid plaintiff's compensation claim. This position has been characterized as "extreme" by the leading treatise in the area of workers' compensation. *See* 2A Larson, *Workmen's Compensation Law* § 72.31(c), at 14-135 (1982). While there are courts outside this jurisdiction that have adopted that position, *see, e.g., Fiore v. Royal Painting Co., Inc.*, 398 So. 2d 863 (Fla. App. 1981), this Court declines to do so.

The Court views as without merit plaintiff's contention that the arrangement whereby defendant took on the responsibility for purchasing compensation insurance for its subcontractors' employees is null and void as contrary to law. The difficulty with this argument is that the second sentence of § 904(a) appears to contemplate precisely such arrangements where the subcontractor does not purchase compensation insurance and the general contractor does. Also, as defendant has aptly noted, no

question has previously been raised about the legality of this arrangement, either by the Department of Labor, the administrative agency charged with overseeing such programs, or by plaintiff himself at the time he collected an award under defendant's compensation program.

To be sure, the present case does not present a situation in which the general contractor purchased needless insurance for employees who were already insured by a subcontractor. Thus, the situation here is distinguishable from that presented in *Thomas v. George Hyman Construction Co.*, 173 F. Supp. 81 (D.D.C. 1959) and *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979), cases which have been cited by plaintiff in support of his view. Rather, the two apposite decisions in this jurisdiction support the position proffered by defendant that it should be held immune. *See Johnson v. Bechtel Associates Professional Corporation*, CA No. 81-0963 (D.D.C. Aug. 24, 1982) (Corcoran, J.); *Eighmey v. Bechtel Associates Professional Corporation*, CA No. 81-1261 (D.D.C. July 30, 1982) (Green, J.).

II. *PLAINTIFF CAN STILL BRING SUIT AGAINST THE SUBCONTRACTOR WHO EMPLOYED HIM*

Although the defendant in this action is immune from suit, the Court is of the opinion that plaintiff still has other remedies at common law, beside the compensation award he has already received. Under 33 U.S.C. § 933, plaintiff is eligible to sue any person "other than the employer or a person in his employ," even though he has elected to receive compensation from defendant. Under District of Columbia law, this provision has been interpreted to allow suits against a general contractor where plaintiff has previously received compensation from his subcontractor employer. *See Liberty Mutual Insurance Co. v. Goode Construction Co.*, 97 F. Supp. 316 (E.D. Va. 1951) (applying D.C. law). The Court sees no reason why, in the present situation where plaintiff received

compensation from the general contractor, a "third-party" suit could not be brought against the subcontractor who has contributed nothing toward plaintiff's compensation. Although this Court has previously dismissed an attempt by Bechtel Associates to bring the subcontractor into this action, plaintiff can still bring an independent action of his own.

One possible obstacle that might be raised to such a suit is the statute of limitations.[2] However, this Court has already held that the statute of limitations in this action did not begin to run until the date of *discovery* of the injury for which plaintiff seeks relief. *See also Fearson v. Johns Manville Sales Corp.*, 525 F. Supp. 67 (D.D.C. 1981). Plaintiff here did not discover he had pneumoconiosis until June 3, 1981. So, presumably, he has until three years from that date to bring suit against "third-parties" such as the subcontractor for whom he worked. If he wishes relief at common law, that is the course he ought to take.

CONCLUSION

Having found that defendant was obligated by § 904 (a) to purchase insurance applicable to plaintiff, which it did, the Court hold that defendant is immune from suit under § 905(a).

An Order in accordance with the foregoing shall be issued of even date herewith. Thus, defendant's motion for summary judgment shall be granted and this action against defendant shall be dismissed.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

September 3, 1982

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[2] Defendant in this action already raised the issue of statutory bar. However, the Court need not reach the issue here because of its holding under § 905(a).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1125

CALVIN WALKER, *et ux.*,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Sep. 2, 1982]

ORDER

For the reasons stated in the memorandum opinion accompanying this Court's order in *Clanagan v. Washington Metropolitan Area Transit Authority*, Civil Action No. 81-1481, of even date herewith, it is, by the Court, this 2d day of September, 1982,

ORDERED that defendant's motion for summary judgment is granted, and it is

FURTHER ORDERED that this action is dismissed without prejudice to the bringing of an entirely new action by plaintiff against the subcontractor for whom he worked.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Oct. 6, 1982]

MEMORANDUM AND JUDGMENT

This matter is before the court for resolution of defendant WMATA's motion for summary judgment. Defendant WMATA has moved for summary judgment on two main grounds: 1) plaintiff's cause of action is barred by the applicable statute of limitations, and 2) plaintiff's cause of action is barred by certain provisions of the District of Columbia Workmen's Compensation statute. In support of the second prong of its motion, WMATA has referred this court to two recent decisions of this district court which basically hold that WMATA's mandatory purchase of workmen's compensation insurance for its employees entitles it to immunity from personal injury suits by those same employees. *See Johnson v. Bechtel Associates, et al.*, No. 81-0963 (D.D.C. August 24, 1982); *Eighmey v. Bechtel Associates, et al.*, No. 81-1261 (D.D.C. July 30, 1982). Plaintiff has cited one case from a Florida state appellate court which holds to the contrary. *See Fiore v. Royal Painting Company, Inc.*, 398 So.2d 863 (Fla. App. April 28, 1981). After considering the materials submitted on this motion, together with the arguments of counsel, this court believes that

it must follow the recent decisions made by other members of this district. The opinions of Judge Corcoran and Judge Green appear both well-supported and well-reasoned. This being so, the court need not discuss any of WMATA's alternative arguments and summary judgment must now be entered for defendant WMATA in this case.

On the basis of the foregoing, it is, by the court, this 5th day of October, 1982,

ORDERED ADJUDGED and DECREED that defendant WMATA's motion for summary judgment is hereby granted.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0999

GLENWOOD WILLIAMS,
Plaintiff,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Oct. 6, 1982]

JUDGMENT

It is, by the court, this 6th day of October, 1982,

ORDERED, ADJUDGED and DECREED that defendant WMATA's motion for summary judgment shall be, and hereby is, granted.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-3057

JAMES H. BUCHANAN, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Nov. 19, 1982]

MEMORANDUM

James and Shirley Buchanan bring this action against Bechtel Civil and Minerals, Inc., Bechtel Associates Professional Corporation, D.C., (Bechtel, collectively) and the Washington Metropolitan Area Transit Authority (WMATA) for damages allegedly resulting from lung injuries James Buchanan received during his employment at various WMATA construction sites. The action is before the Court on WMATA's motion for summary judgment.

James Buchanan began working as a hard rock miner on WMATA construction projects beginning in 1978. On September 27, 1979, Mr. Buchanan filed a workmen's compensation claim for damages due to lung injuries allegedly caused by his work at the construction sites. On December 14, 1981, plaintiffs filed this judicial action against Bechtel for damages resulting from the same lung injuries. On July 7, 1982, the Court allowed plaintiffs to file an amended complaint which added WMATA as a defendant. WMATA is now the only defendant in

this action because on July 28, 1982, the Court granted Bechtel's motion for summary judgment, due to Bechtel's immunity from suit under the WMATA compact.

WMATA has moved for summary judgment on two grounds. WMATA contends that this action was not commenced within the statutory time limit and, alternatively, claims that this action is precluded by the applicable workmen's compensation statute. The Court will not address the statute of limitations issue because plaintiffs' suit against WMATA is clearly barred by the workmen's compensation provisions.

The federal Longshoremen's and Harbor Worker's Compensation Act (the Act), 33 U.S.C. § 901-950, contains the controlling workmen's compensation provisions for this action. *See* D.C. Code § 36-501 to § 36-502 (1973). Under the Act each employer in the District of Columbia is required to purchase workmen's compensation insurance to cover his employees. The employer is compensated for providing such coverage by a grant of immunity from civil suits for damages resulting from employment. *See* 33 U.S.C. § 904-905; *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). General contractors are required to provide coverage for the employees of subcontractors "unless the subcontractor has secured such payment." 33 U.S.C. § 904 (1976). WMATA claims that it is immune from suits for damages to employees such as Mr. Buchanan because WMATA purchased the workmen's compensation coverage which protects the employees of its subcontractors.

The precise issue of whether WMATA is immune from suits brought to recover damages incurred by employees of metrorail construction firms has been presented to this District Court four times previously. In all four cases WMATA was granted summary judgment on the grounds that § 905 of the Act protected WMATA from such suits. *See Eighmey v. Bechtel Associates Professional*

Corporation, D.C., et al., No. 81-1261 (D.D.C. July 30, 1982) (order granting summary judgment fpr [sic] WMATA); *Johnson v. Bechtel Associates Professional Corporation, D.C., et al.*, No. 81-0963 (D.D.C. August 24, 1982) (order granting summary judgment); *Clanagan v. Washington Metropolitan Area Transit Authority*, No. 81-1481 (D.D.C. Sept. 2, 1982) (order dismissing WMATA); *Williams v. Washington Area Transit Authority*, No. 82-0999 (D.D.C. Oct. 6, 1982) (order granting summary judgment). These four cases, before four separate judges of this Court, persuasively establish tht [sic] WMATA is entitled to immunity from suits of the type brought by plaintiffs.

Accordingly, WMATA's motion for summary judgment is granted. Since no defendant remains, this action is dismissed.

/s/ John Louis Smith, Jr.
United States District Judge

Dated: November 19, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-3057

JAMES H. BUCHANAN, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Nov. 19, 1982]

ORDER

Upon consideration of defendant Washington Metropolitan Area Transit Authority's motion for summary judgment, plaintiffs' opposition thereto, oral argument by counsel and the entire record, it is by the Court this 19th day of November 1982

ORDERED that defendant's motion for summary judgment is granted and this action is dismissed.

/s/ John Louis Smith, Jr.
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

WMATA,

Defendant.

[Filed Dec. 16, 1982]

MEMORANDUM

This matter comes before the court on the motion of defendant for summary judgment and on the motion of plaintiff to amend his complaint to add as defendants the subcontractors involved in the construction of the Washington subway. For the reasons set forth below, defendant's motion for summary judgment shall be granted, and plaintiff's motion to amend his complaint shall be denied.

A. Summary Judgment

In support of its motion WMATA argues that plaintiff's claim is barred by § 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a) (1976), which has been adopted as the Worker's Compensation statute of the District of Columbia, D.C. Code § 36-501 (1973).

Three other judges of this court facing precisely the same question have all held that Section 905(a) provides WMATA with immunity from suit because of its purchase of worker's compensation insurance. *See Clanagan* v. *WMATA*, No. 81-1481 (D.D.C. Sept. 2, 1982); *Johnson*

v. *Bechtel Associates, et al.*, No. 81-0963 (D.D.C. Aug. 24, 1982), *Eighmey* v. *Bechtel Associates, et al.*, No. 81-1261 (D.D.C. July 30, 1982). In a Memorandum and Judgment of October 5, 1982, in the case of *Williams* v. *WMATA*, No. 82-0999, this court, presented with the same question, decided to follow the well-reasoned decisions noted above by the other members of this court.[1]

In an attempt to circumvent this statutory bar, plaintiff in this case filed a Supplemental Opposition[2] contending that WMATA was not entitled to statutory immunity because it was not in fact the general contractor. "In support of its argument plaintiff submitted copies of contracts, between WMATA and construction companies responsible for construction of parts of the subway system, in which the construction companies, not WMATA, were referred to as "contractor."

The verbal gymnastics of plaintiff's counsel have already been rejected by two other judges of this court. *See Buchanan* v. *Bechtel Associates Professional Corp.*, No. 81-3057 (D.D.C. Nov. 19, 1982); *Johnson* v. *Bechtel Associates Professional Corp.*, No. 81-0963 (D.D.C. Nov. 19, 1982). Under the WMATA Compact WMATA clearly fulfills the function of overall general contractor of the rapid transit system and, as purchaser of worker's

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[1] In the instant case this court, in a Memorandum and Order of October 9, 1982, decided to hold in abeyance its action on defendant's motion and to order supplemental briefing on the question of whether plaintiff's motion to amend would be barred by the statute of limitations.

[2] In those cases cited above where the court had already granted summary judgment for WMATA plaintiff's counsel, also counsel in those actions, filed motions for reconsideration under Fed. R. Civ. P. 60(b)(3) alleging that WMATA had fraudulently misrepresented itself as general contractor.

In *Williams* v. *WMATA, supra*, plaintiff's counsel filed a motion for reconsideration under Fed. R. Civ. P. 59 one day after this court granted summary judgment for WMATA.

compensation insurance, is entitled to statutory immunity from suit. The court sees no reason to depart from its course of following the decisions of the other members of this court. Defendant's motion for summary judgment shall be granted.

B. Motion to Amend

In a further attempt to preserve some claim plaintiff now seeks to add WMATA's subcontractors as defendants. In a Memorandum and Order dated October 19, 1982, this court noted that the parties in their first filings on this motion did not address the issue raised by the possible bar of the statute of limitations to plaintiff's motion. If a complaint as amended would be barred by the statute of limitations, a court may deny the motion to amend. *Sackett* v. *Beaman*, 399 F.2d 884, 892 (9th Cir. 1968).

Plaintiff discovered his illness in January 1978. Any amendment adding the subcontractors today would be barred by the three-year statute of limitations of D.C. Code § 12-301 unless the amendment related back to the date of the original complaint. Fed. R. Civ. P. 15 provides that an amendment seeking to add a party may relate back if the party to be added, within the time provided by law for the commencement of the action, had received notice of the institution of the action and knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him. Plaintiff has failed to meet either of the requirements of Rule 15, advancing instead the unsupported argument that the subcontractors should be estopped from asserting the bar of the statute of limitations because they lulled plaintiff into inaction by misrepresenting themselves as being plaintiff's statutory employers and thus immune from suit. Plaintiff, or rather plaintiff's counsel, may not now try to blame others for their strategic miscalculations or misunder-

standing of the law. Plaintiff's motion to amend must be denied.

An appropriate Judgment and Order accompanies this Memorandum.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0114

STANLEY WILMES,

Plaintiff,

v.

WMATA,

Defendant.

[Filed Dec. 16, 1982]

JUDGMENT AND ORDER

This matter is before the court on the motion of defendant for summary judgment and on the motion of plaintiff for leave to amend his complaint. Upon consideration of the motions, and the oppositions thereto, as well as the entire record in this case, and after oral argument, for the reasons set forth in the accompanying Memorandum, it is, by the court this 16th day of December, 1982, hereby

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is granted; and it is further

ORDERED that plaintiff's motion to amend his complaint is denied; and it is further

ORDERED that plaintiff's action shall be, and hereby is, dismissed.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

Judge June L. Green

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs,

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants.

[Filed Sep. 13, 1982]

ORDER

This matter came before the Court on the plaintiff's Motion for Reconsideration. Having considered the motion and the defendant Washington Metropolitan Area Transit Authority's opposition thereto, the Court this 10th day of September, 1982:

ORDERS: that the plaintiff's Motion to Reconsider be, and the same hereby is, DENIED.

/s/ June L. Green
United States District Judge

Copies to:

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APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-963

PAUL D. JOHNSON,
Plaintiff,

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants.

[Filed Nov. 22, 1982]

ORDER

This matter is before the Court on plaintiff's motion for relief from judgment, pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure. On consideration of the motion, the memorandum in support thereof, defendant's opposition thereto, plaintiff's reply to the opposition and the entire record herein, the Court finds that the allegations of "fraud, misrepresentation or misconduct" are not supported by the record and are without merit. It is, accordingly, this 19th day of November, 1982.

ORDERED that plaintiff's motion for relief under Rule 60(b)(3) be, and the same is, hereby DENIED; and it is

FURTHER ORDERED that plaintiff shall pay reasonable costs, including attorneys fees, incurred by the defendant in opposing this motion. Counsel for defendant shall submit an affidavit of costs within 10 days of the entry of this Order.

/s/ John Louis Smith, Jr.
Judge

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1481

JOHN CLANAGAN,
Plaintiff
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

Civil Action No. 82-1125

CALVIN WALKER, *et ux.*,
Plaintiffs
v.
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Defendant.

[Filed Dec. 9, 1982]

ORDER

Before the Court are plaintiffs' motions for relief pursuant to Rule 60(b)(3), defendant's oppositions thereto, and the entire records herein. For the reasons stated in Judge Corcoran's order of November 19, 1982 in *Johnson v. Bechtel Associates Professional Corporation*, No. 81-963 (D.D.C. 1982), it is, by the Court, this 3 day of December, 1982,

ORDERED, that plaintiffs' motions are denied, and it is

FURTHER ORDERED, that plaintiffs shall pay reasonable costs, including attorneys' fees, incurred by the defendant in opposing these motions.

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1261

HOWARD L. EIGHMEY, *et al.*,
Plaintiffs

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*,
Defendants

[Filed Dec. 10, 1982]

ORDER

Upon consideration of plaintiffs' motion for relief under Rule 60(b)(3) from the judgment of this Court in favor of defendant Washington Metropolitan Area Transit Authority, defendant's opposition, plaintiffs' reply, defendant's response, and the entire record in this action, the Court finds that plaintiffs' allegations of fraud, misrepresentation or other misconduct are not supported by the record. Accordingly, it is by the Court this 10th day of December 1982,

ORDERED that plaintiffs' motion for relief under Rule 60(b)(3) of the Federal Rules of Civil Procedure is denied.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-999

GLENWOOD WILLIAMS,
Plaintiff,

v.

WMATA,
Defendant.

[Filed Dec. 16, 1982]

ORDER

This matter comes before the court on plaintiff's motion for reconsideration of this court's memorandum and judgment of October 5, 1982, granting defendant's motion for summary judgment.

For the reasons set forth in this court's recent memorandum in *Wilmes* v. *WMATA*, No. 81-0114 (D.D.C. Dec. 16, 1982) plaintiff's motion is denied.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

PAUL D. JOHNSON,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-1784

HOWARD L. EIGHMEY, ET AL.,
Appellants

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

No. 82-1809

CALVIN WALKER, *et al.*,
Appellants

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

No. 82-1813

JOHN WARREN CLANAGAN,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-1899

PAUL D. JOHNSON,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2062

CALVIN WALKER and RENA WALKER,
Appellants

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2063

JOHN WARREN CLANAGAN,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2148

HOWARD L. EICHMEY, *et al.*,
Appellants

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2374

STANLEY WILMES,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2458

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2459

JAMES H. BUCHANAN and SHIRLEY BUCHANAN, his wife,

Appellants

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2525

STANLEY WILMES,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2529

CALVIN WALKER, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 82-2530

JOHN WARREN CLANAGAN,
Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2531

HOWARD L. EIGHMEY, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY, *et al.*

No. 83-1003

GLENWOOD WILLIAMS,
Appellant

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 81-00963, 81-01261, 81-01125, 81-01481, 81-00114, 81-03057 and 82-00999)

Argued March 28, 1983

Decided August 19, 1983

Peter J. Vangsnes and *William F. Mulroney*, with whom *James M. Hanny* and *Michelle A. Partiff* were on the brief, for appellants. *Michael H. Feldman*, also entered an appearance for appellants.

Gary W. Brown, with whom *James F. Bromley*, *James W. Greene*, *William G. Schaefer* and *Ronald Flagg* were on the brief, for appellees, Bechtel Associates Professional Corporation, et al. *Catherine H. Lesica* and *Elaine L. Johnston*, also entered appearances for appellees, Bechtel Associates Professional Corporation, et al.

Vincent H. Cohen, with whom *Robert B. Cave* was on the brief, for appellee, Washington Metropolitan Area Transit Authority.

Robert L. Ellis, *Edward J. Lopata*, *J. Joseph Barse*, *F. Wainwright Barnes*, and *Laurence T. Scott* were on the joint brief of amici curiae, Metro Subway Construction Contractor/Employers.

Before: ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge* and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: These consolidated appeals [1] arise from negligence actions instituted by em-

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[1] Because of the similarity of issues in the numerous actions growing out of the WMATA construction, the court ordered these appeals consolidated and expedited. Johnson v. Bechtel Assoc. Prof. Corp., No. 82-2017 (D.C. Cir. Jan. 7, 1983).

ployees of contractors who performed underground work on the Washington Metropolitan Area Transit subway project (Metro). With the exception of Eighmey who was injured in a construction accident, the appellants allegedly sustained respiratory injuries as a result of exposure to high levels of silica dust and other industrial pollutants in the subway project. The injured employees all filed workmen's compensation claims and received compensation awards. The employees then instituted third-party negligence actions against either the Washington Metropolitan Area Transit Authority (WMATA or the Authority)[2] or Bechtel,[3] the safety engineer for the project.

Because of the nature of the contractual relationship between the parties, WMATA or Bechtel appeared to be a proper third-party defendant. WMATA exercises the ultimate control of and authority for the construction and operation of the subway system. WMATA contracted with Bechtel to provide safety engineering services. Contracts for the actual construction work were awarded to a variety of subcontractors. Appellants were employees of these subcontractors.

In the district court each defendant, WMATA or Bechtel, moved for and was granted summary judgment.

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[2] The Washington Area Metropolitan Transit Authority (WMATA or the Authority) is a legal entity created by and deriving its authority from an interstate compact (Compact) entered into by Maryland, Virginia, and the District of Columbia with the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. WMATA was formed to develop and operate a transit system (Metro) in the District of Columbia metropolitan area. Pub. L. No. 89-774, 80 Stat. 1324 (1966) (codified at D.C. Code § 1-2431 (1981)). The Authority may sue and be sued. Compact § 12.

[3] Two Bechtel entities were sued in the district court actions, Bechtel Civil and Minerals, Inc., a Nevada corporation, and its local affiliate, Bechtel Associates Professional Corporation. The two corporations are indistinguishable for the purposes of these appeals and therefore will both be referred to simply as "Bechtel."

Appellants contest these judgments and present four issues for our resolution. We discuss each issue separately and conclude:

(1) Bechtel was an agent of WMATA and therefore, under section 80 of the Compact, WMATA is exclusively liable for Bechtel's torts. Accordingly we affirm the grant of summary judgment to Bechtel on this issue.

(2) WMATA is not entitled to the immunity accorded to employers under section 905(a) of the Longshoremen's Act. Accordingly we reverse the grant of summary judgment to WMATA on this issue.

(3) A more complete factual record is necessary to determine whether, under FED. R. CIV. P. 15(c), WMATA was properly added as a defendant. Accordingly we remand these cases.

(4) Under section 33(b) of the Longshoremen's Act an injured employee cannot institute a third-party negligence action after the expiration of the six-month period following acceptance of a compensation award. Accordingly we affirm the dismissal of the *Williams* case.

I. SECTION 80 OF THE WMATA COMPACT

Defendant Bechtel based its motion for summary judgment upon section 80 of the WMATA Compact.[4] Section 80 establishes WMATA's contract and tort liability and provides:

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental func-

[4] *See* note 2 *supra*.

> tion. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Bechtel asserted that it functioned as an "agent" of WMATA when performing its safety duties, and was therefore entitled to immunity from negligence actions by operation of section 80 of the Compact. Bechtel argued that WMATA was exclusively liable for any work-related tortious injury suffered by the employees. Each district court which considered this issue found that Bechtel was an agent of WMATA within the meaning of section 80 and granted summary judgment.[5] We affirm the judgments of the district courts on this issue.

A. *Legal Standard*

While conceding that, in its role as safety engineer, Bechtel was an agent of WMATA within the "broadest terms," appellants nevertheless assert that the term "agent" in section 80 of the Compact should be given a narrow construction. Appellants attempt to remove Bechtel from the operation of section 80 by arguing that Bechtel was an "independent contractor"-agent and, therefore, not within the class of "servant"-agents for whom a principal is vicariously liable. However, this attempted distinction, based primarily upon the Restatement (Second) of Agency (1958), fails because resolu-

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[5] Appellants challenge the grant of summary judgment on the section 80 issue in the following cases: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. July 21, 1982); Walker v. Bechtel Civil and Minerals, Inc., No. 81-1125 (D.D.C. July 8, 1982); Clanagan v. Bechtel Assoc. Prof. Corp., No. 81-1481 (D.D.C. July 8, 1982); Eighmey v. Bechtel Civil and Minerals, No. 81-1261 (D.D.C. June 21, 1982).

tion of this issue turns on the use of the word "agent" within a statute expressly designed to shift liability exclusively to the principal, WMATA.[6] While resort to the Restatement may be informative, it is not dispositive; instead, we look to the statute itself.

The use of the word "agent" in section 80 is unqualified[7] and there is no reason, under these circumstances,

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[6] Appellants' reliance on the Restatement is misplaced. While the Restatement does distinguish between "servants" and "independent contractors" for some purposes, it also makes clear that both "servants" and "independent contractors" may be agents. Restatement (Second) of Agency § 2 (1958).

Section 251 of the Restatement, applied to the situation herein, obviates the need for any distinction between "servants" and "independent contractors" or "non-servants agents."

> § 251. Liability for Physical Harm Caused by a Servant or a Non-servant Agent
>
> A principal is subject to liability for physical harm to the person . . . of another caused by the negligence of a servant or a non-servant agent:
>
> > (a) in the performance of an act which the principal is under a duty to have performed with care . . . .

Restatement (Second) of Agency § 251 (1958).

WMATA, the principal, had a duty to protect workers from physical harm caused by the construction of Metro. By entrusting the performance of that duty to an agent (Bechtel), WMATA is liable for any harm caused by its agent's negligence, regardless of whether the agent was a servant or an independent contractor. *See* Restatement (Second) of Agency § 251 comment (a) (1958).

[7] Appellants suggest that the legislative history of the Compact reveals that the term "agent" was intended to have an extremely narrow meaning. The only "legislative history" cited by appellants is a Senate Judiciary Committee Staff paper which, appellants purport, explains the purpose of section 80.

> *Liability for Contracts and Torts*
>
> (Article XVI sec. 80)
>
> This would make the Authority [WMATA] liable for its contracts and torts and the torts of its *personnel* (emphasis added) committed in the conduct of any *proprietary* function,

for distinguishing between "independent contractors" who are agents and "servants" who are agents. Guided by accepted rules of statutory construction and noting that there is no indication that the drafters of the Compact intended to use "agent" in a restrictive manner, we accord the term its common and usual meaning. *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) ("Unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning,' *Perrin v. United States*, 444 U.S. 37, 42 (1979) . . . .").

An agent is one who is authorized by another (principal) to act on his behalf. An agent-principal relationship is characterized by the presence of two elements. First, there must be an indication by the principal that the agent will act on his behalf and subject to his control. And second, there must be a manifestation of consent by the agent so to act. Restatement (Second) of Agency § 1 (1958); *Rose v. Silver*, 394 A.2d 1368 (D.C. App. 1978). *Accord Lott v. Burning Tree Club, Inc.*, 516 F. Supp. 913, 917 (D.D.C. 1980) (Police are not agents of Country Club because not designated as such and Club exercised no *control* over the police.). The extent of control and consent is evidenced both by the terms of the contract and by the actual dealings between the parties.

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in accordance with the law of the applicable signatory (including rules on conflict of laws). It would absolve the Authority from liability for torts occurring in the performance of a *governmental* function, and provides that this section would not constitute a waiver by any of the signatories or their subjurisdictions of any immunity from suit.

Ludolph Brief at 22.

Based upon this statement, appellants argue that the intent of section 80 was to immunize only *individuals* acting as agents and not "large corporate entities such as Bechtel." This argument is not persuasive. The "legislative history" relied upon is little more than a loose restatement of the statute. Without more, such statements cannot serve to narrow the meaning of an unambiguous statutory term.

Applying the foregoing legal standards, we examine the contract between Bechtel and WMATA and the actual on-the-job practice.

B. *The WMATA-Bechtel Relationship*

WMATA contracted with Bechtel to administer the safety program on the entire subway construction project.[8] Taken as a whole, the contract provides that Bechtel shall act on behalf of and subject to the authority of WMATA. Numerous provisions of the contract specify the exact nature and extent of control which WMATA exercises over Bechtel. For example, Paragraph 1 of the Scope of Services portion of the WMATA-Bechtel contract provides:

> The [WMATA] Contracting Officer shall be kept fully informed of all operations under this contract and [Bechtel] shall have authority to conduct these operations for and in the name of the Authority [WMATA], subject to the approval of the [WMATA] contracting officer.

Article XVI of the General Provisions section of the Contract provides:

> The extent and character of the work to be done by [Bechtel] shall be subject to the general supervision, direction, control and approval of the [WMATA] Contracting Officer and the authorized representative of the Contracting Officer to whom [Bechtel] shall report and be responsible.

In addition to specifying the general working relationship, the WMATA-Bechtel contract provides that all

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[8] The annual contracts executed by WMATA and Bechtel from 1971 until the present did not change significantly from year-to-year. The relevant portions of these contracts are exhibits in the district court record in Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, and all references to the contracts are to the district court record.

personnel hired by Bechtel for the WMATA project must be approved by WMATA. General Provisions, Art. IX. The salaries of these employees are also subject to approval by WMATA. Special Provisions, Sec. III. Once WMATA approves a Bechtel employee to serve as an on-site Resident Engineer, Bechtel cannot transfer, reassign, or fire him without the Authority's approval.[9]

The allocation of authority and responsibility between WMATA and Bechtel is further specified in the Coordinated Safety Program & Reporting Procedures Manual which is specifically incorporated into the WMATA-Bechtel contract. The Safety Manual provides that a full-time WMATA employee, the Contracting Officer, has primary responsibility for overseeing the safety-related aspects of the project. Another WMATA official, the Safety Engineer, is charged with evaluating and directing the activities of the Bechtel Safety Department. Taken as a whole, the WMATA-Bechtel contract provides for extensive and pervasive control by WMATA over Bechtel personnel.

The actual day-to-day work performed by Bechtel on the construction sites reinforces the conclusion that Bechtel serves as WMATA's agent.[10] On the job site the Resident Engineer, a Bechtel employee, represents WMATA and is responsible for ensuring that the various contractors comply with WMATA safety regulations. In the discharge of his duties, Bechtel's Resident Engineer is subject to the direction of the WMATA Contracting Officer from whom he receives both written and verbal in-

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[9] At a hearing conducted by the district court in Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, on May 17, 1982, John S. Egbert, Assistant General Manager for Design and Construction for WMATA (Contracting Officer), testified to the working relationship between WMATA, Bechtel, and the subcontractors. The relevant testimony is contained in Appellees Record Excerpts 22-23, 51, and 51.

[10] *See* note 9 *supra*.

structions. Although the Resident Engineer is authorized to direct correction of safety violations, in practice he rarely takes any major action without first consulting WMATA. The Resident Engineers carry business cards identifying them as "Authorized Representative[s] of the Contracting Officer," *i.e.*, WMATA. In their daily work, the Bechtel safety personnel are subject to the direction of WMATA officials and function essentially as WMATA employees.

C. *Conclusion*

It is unimportant whether the WMATA-Bechtel relationship was a master/servant agency relationship or a principal/independent contractor agency relationship. "Agent," as used in the Compact, is unqualified and, therefore, embraces both types of agency relationships.

To determine if a party is an "agent" within the broadest meaning of the term, the court looks to the entirety of the relationship for evidence of *consent* between the parties to establish a principal-agent relationship and for evidence of the degree of *control* exercised by the principal. The district courts correctly concluded that both mutual consent and a sufficient degree of control were present in the WMATA-Bechtel relationship to establish that Bechtel acted as an agent of WMATA. By the terms of section 80 of the Compact, therefore, WMATA is exclusively liable for the torts of its agent, Bechtel. We affirm the grant of summary judgment to Bechtel on this issue.

II. Section 905 of the Longshoremen's and Harbor Worker's Compensation Act

At the time of their alleged injuries, the appellants were employed by construction companies under contract to WMATA to construct specific segments of the Metro project. These subcontractors did *not* purchase workmen's

compensation insurance for their employees; instead WMATA purchased such insurance to cover all laborers and other employees working on the Metro system. After sustaining an injury, each employee filed for and received workmen's compensation benefits. Exercising their statutory right to sue a third-party tortfeasor, several of the injured employees instituted an action against WMATA.

WMATA responded with a motion for summary judgment, asserting that because it obtained and paid for the workmen's compensation insurance required by section 904(a)[11] of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et seq.* (1976 & Supp. V 1981),[12] it was entitled to the statutory immunity accorded to an "employer" under section 905(a).[13] Each federal district court which considered this question granted summary judgment in favor of WMATA.[14] We reverse.

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[11] The Act, 33 U.S.C. § 904(a) (1976), provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

[12] The District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* (1973), adopted the provisions of the federal Longshoremen's and Harbor Workers' Compensation Act. For simplicity, the Act will be referred to by the federal statute section numbers.

[13] 33 U.S.C. § 905(a) (1976) provides:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . .

[14] Appellants challenge the grant of summary judgment on the section 905(a) issue in the following cases: Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16,

In reaching their decisions, the district courts relied exclusively upon the fact that WMATA furnished the workmen's compensation insurance, accepting the argument that section 904(a) employer immunity is a *quid pro quo* for providing such insurance. The courts premised their *quid pro quo* conclusion upon the assumption that WMATA was *legally required* to purchase the compensation insurance. A closer analysis of the language and purpose to the Act and the relevant case law leads to the conclusion that in these circumstances WMATA was not *required* to provide the compensation insurance. Furthermore, the voluntary provision of such insurance does not entitle the provider to the statutory employer immunity of section 905(a).

To analyze the intended operation of the compensation insurance provisions, one must begin with the overall purpose and design of the Longshoremen's Act. As this court acknowledged in *Potomac Electric Power v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965) (footnote omitted):

> The Longshoremen's and Harbor Workers' Compensation Act must be construed liberally in favor of the injured employee. Narrow statutory construction should not deprive the injured employee of either his compensation or his claim in damages against third parties.

This overriding purpose underlies our interpretation of sections 904 and 905 of the Act.

The Act is designed to insure that all employees are covered by worker's compensation insurance and will

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1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. Nov. 19, 1982); Williams v. Washington Area Metropolitan Transit Auth., No. 82-0999 (D.D.C. Oct. 6, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. Sept. 2, 1982); Walker v. Washington Metropolitan Area Transit Auth., No. 81-1125 (D.D.C. Sept. 2, 1982); Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0068 (D.D.C. Aug. 24, 1982); Highsey v. Bechtel Assoc. Prof. Corp., No. 81-1261 (D.D.C. July 30, 1982).

thereby receive prompt compensation for work-related injuries. To assure the availability of compensation, employers are required to carry insurance. 33 U.S.C. § 932 (1976). Failure to do so may result in criminal sanctions. *Id.* § 938. In return for carrying the required insurance, an employer is absolved from all other liability, even if the employee's injury is attributable to employer negligence. *Id.* § 905. In the scheme of the Act, not only is the employee entitled to prompt compensation payments, but he also retains the right to sue any third party whose negligence may have caused or contributed to his injuries. *Id.* § 933. When a job involves a general contractor and subcontractors, the Act requires the subcontractor to obtain the workmen's compensation insurance. *Id.* § 904. The general contractor is not obligated to obtain insurance "unless" the subcontractor fails to do so. *Id.*

While the Act does not expressly designate who obtains section 905 employer immunity when a general contractor and subcontractor are involved, courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance. When both the general contractor and the subcontractor carry workmen's compensation insurance, courts have held that *only* the subcontractor is entitled to statutory immunity. The general contractor is denied section 905(a) immunity because he is not *statutorily* required to carry insurance. *Thomas v. George Hyman Const. Co.*, 173 F. Supp. 381 (D.D.C. 1959). *Accord DiNicola v. George Hyman Const. Co.*, 407 A.2d 670, 674 (D.C. App. 1979) ("[T]he Longshoremen's Act[] impose[s] on the general contractor the duty to secure compensation insurance *only* if the subcontractor has failed to do so."); *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) ("[T]he structure of §§ 904, 905 . . . add up to show that the provision imposing on the general contractor compen-

sation liability to an employee of a subcontractor is a secondary, protective one.").[15]

A fundamental premise of the compensation insurance scheme is that the general contractor's statutory duty to secure workmen's compensation insurance is *secondary*. "The general contractor has a *secondary, guaranty-like liability.*" *Probst, supra*, 379 F.2d at 767 (emphasis added). The subcontractor is primarily and initially responsible; the general contractor becomes responsible *only*

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[15] *Probst* expressly reserved

> the question of what ought to be done if the general contractor, or general employer, is actually *required* to pay compensation benefits to the injured employee of the subcontractor under § 904.

379 F.2d at 767 (footnote omitted) (emphasis added). However, the question left open in *Probst* is not the precise issue herein. WMATA was not "required" to obtain workmen's compensation insurance under section 904. WMATA *voluntarily* assumed that responsibility.

The fact that WMATA voluntarily obtained compensation insurance also distinguishes the WMATA case from Fiore v. Royal Painting Co., 398 So. 2d 863 (Fla. Dist. Ct. App. 1981). In *Fiore*, the subcontractor's insurance *lapsed* unbeknownst to the general contractor. Following the work-related death of an employee of the subcontractor, the general contractor payed direct benefits to the decedent's widow and children. In a subsequent wrongful death action, the defendant-contractor moved for and obtained summary judgment based upon section 905(a) employer immunity.

Reversing the grant of summary judgment on appeal, the *Fiore* court held that the general contractor was not entitled to statutory immunity. The court rejected the general contractor's *quid pro quo* argument and construed the Act to allow immunity only to the "actual employer (in this type of situation, a *complying* subcontractor)." *Id.* at 865. The *Fiore* court denied statutory immunity to the general contractor, notwithstanding the fact that his subcontractor had defaulted and the general contractor had in fact assumed his obligation under the statute. *Fiore* represents an extreme interpretation of the Act and is distinguishable on its facts.

upon the subcontractor's default. As the court stated in *Thomas v. George Hyman*, *supra*, 173 F. Supp. at 383:

> The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance *only if the subcontractor fails to do so.* In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, *voluntarily* take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may not escape from such liability by taking out insurance that the law does not require.

(Emphasis added). This interpretation clearly comports with the plain language of sections 904 and 905, as well as with the overall statutory scheme.

By initially providing the insurance for all employees, WMATA pre-empted the subcontractors' statutory duty to secure such insurance. The language and scheme of the Act, as well as the relevant caselaw, clearly establish that a general contractor may not circumvent the intended operation of the Act by, in effect, choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party tortfeasor. To accord WMATA section 905 employer immunity would frustrate the operation of the Act. WMATA cannot unilaterally decide to purchase the workmen's compensation insurance itself and thereby obtain section 905 immunity. To benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance. It is only by providing compensation insurance

when the subcontractors fail to do so that WMATA obtains immunity as a statutory employer.

WMATA suggests that its circumstance is analogous to the situation wherein the subcontractor fails to obtain insurance or the subcontractor's insurance lapses. In such instances, the statute provides that the general contractor then becomes responsible for assuring that workmen's compensation insurance is provided. However, WMATA's circumstance is not analogous. WMATA did not follow the statutory scheme; instead it pre-empted the proper functioning of the scheme. WMATA, the general contractor, *initially* provided the workmen's compensation insurance when it was under *no legal duty* to do so; the Authority thereby supplanted its subcontractors' primary, statutory duty.

WMATA attempts to justify its actions by explaining that its wrap-up insurance plan was "the only effective way to ensure that all employees would be covered by compensation insurance at all times." WMATA Reply Brief at 27. WMATA contends that after attempting to require all subcontractors to provide workmen's compensation insurance, it found the task impossible to administer. Therefore, after 1971 WMATA instituted a "coordinated insurance plan" whereby it purchased workmen's compensation insurance for all employees of all subcontractors. Although WMATA asserts that it was primarily concerned with fulfilling its section 904 duty, the Authority also reveals that the wrap-up insurance program "substantially lessen[ed] [its] administrative burden and effectuat[ed] a substantial savings in costs." WMATA Reply Brief at 27-28. That it was more convenient and cost effective to carry the insurance does not excuse deviation from the statutory scheme. Nor does the size of the project affect the intended operation of the statutory provisions. WMATA had no statutory duty to provide insurance until and unless a subcontractor failed in its primary obligation to provide such insurance.

The problems caused by WMATA's deviation from the statutory scheme are evident in these cases. To the injured employees it appeared that their respective employers provided the workmen's compensation insurance. Therefore, when compensation claims were filed and paid, the employees reasonably assumed that under section 905(a) of the Act their immediate employer could not be sued for negligence. Consequently, the employees attempted to exercise their statutory right to a third-party action by instituting suit against WMATA. Only then did it become clear who had actually secured and paid for the compensation insurance. For some employees this discovery came too late to institute suit against their immediate employer who might have been a third-party defendant if WMATA was entitled to section 905 employer immunity. The net effect of this scenario was to confuse and confound the injured employee whom the Act was designed to protect. With the statute of limitations running on his third-party claim, it was unclear to the injured employee which entity, if not both, would be entitled to employer immunity.

The language and purpose of sections 904(a) and 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, as well as the relevant case law, compels the conclusion that WMATA be denied statutory employer immunity.[16] The Act clearly contemplates that an injured employee can receive compensation benefits and have the right to bring a third-party action. We will not immunize a potential third-party defendant when the only basis for so doing rewards that party for circumventing the statutory scheme. Notwithstanding the fact that it provided the workmen's compensation insurance, WMATA is amenable to suit as a potentially liable third-party

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[16] We express no opinion on the issue whether the *subcontractors* have "secure[d]" compensation insurance under section 904(a) and would thereby be entitled to immunity.

tortfeasor. The grants of summary judgment to WMATA are reversed.

III. Rule 15(c) of the Federal Rules of Civil Procedure

In four of the seven actions on appeal, the employees first sued Bechtel and subsequently added WMATA as a defendant by amending their complaint[17] pursuant to Rule 15(c) of the Federal Rules of Civil Procedure.[18] In each instance, WMATA moved for summary judgment on two alternative grounds. First, WMATA asserted that

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[17] In the following cases the district courts allowed the plaintiff to amend his complaint to add WMATA as a defendant: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. May 18, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. July 7, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. July 8, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. July 13, 1982).

In *Wilmes*, the plaintiff also sought to amend his complaint via Rule 15(c) to add the subcontractors as defendants. The district court denied plaintiff's motion to amend. Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16, 1982). Wilmes appeals this denial and for the reasons stated in this section of our opinion, we remand this aspect of the case also. A more complete factual record is a prerequisite for review of a Rule 15(c) decision.

[18] Rule 15(c) of the Federal Rule of Civil Procedure provides:

> (c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

it was not a proper defendant because the requisites of Rule 15(c) were not satisfied. Second, WMATA argued that under section 905(a) of the Longshoremen's Act it was immune from suit as a statutory employer. In each case the district court granted summary judgment for WMATA on the section 905(a) ground and expressly declined to address the Rule 15(c) issue.[19] WMATA seeks to justify the grant of summary judgment in its favor by reurging the contention that it was not properly added as a defendant.

Rule 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party must arise out of the same occurrence as the claims in the original pleading; (2) the new party must have received "notice of the institution of the action" before the limitations period expired; and (3) the new party must know "or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Norton v. International Harvester Co.*, 627 F.2d 18, 20 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979). To permit the addition of a party via a Rule 15(c) amendment, the court must be satisfied that all three tests are met.

WMATA argues that two of the Rule 15(c) criteria were not satisfied and, therefore, that it was improperly made a defendant. First, WMATA notes that the amended complaints adding it as a defendant were filed after the statute of limitations on the underlying tort had run. While Rule 15(c) removes a statute of limita-

[19] Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, slip op. at 1 (D.D.C. Aug. 24, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481, slip op. at 6 n.2 (D.D.C. Sept. 3, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3067, slip op. at 2 (D.D.C. Nov. 19, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. 16, 1982).

tions bar by allowing the amended complaint to "relate back" to the date of the original filing, the party to be added must have received sufficient "notice" of the action so that it is not prejudiced in maintaining a defense. WMATA contends, *inter alia*, that it received notice only upon the actual filing of the amended complaint and that because that filing was made after the expiration of the statute of limitations, such notice is *per se* insufficient. Plaintiffs-appellees counter that because of the "identity of interests" between WMATA and Bechtel, WMATA received constructive notice prior to the expiration of the statutory period. In addition, plaintiffs-appellees assert that WMATA has not been prejudiced by receiving such belated notice. WMATA also contends that the "mistake" requirement of Rule 15(c) was not satisfied because the plaintiffs did not initially make a "mistake" regarding the proper party to be sued, but rather made a tactical decision to sue Bechtel. Plaintiffs-appellees assert that they did in fact make a reasonable legal "mistake" in choosing the original defendant.

Because resolution of these issues in the context of a Rule 15(c) decision involves inherently factual determinations, a complete factual record is required. *McCurry v. Allen*, 688 F.2d 581, 585 (8th Cir. 1982) (Remanded for an evidentiary hearing and findings of fact because "[t]he requirements of Rule 15(c) raise factual issues not susceptible to determination at the appellate level."); *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Furthermore, on the motion for summary judgment each district court expressly declined to reach the Rule 15(c) issue. This court will not, therefore, resolve this issue notwithstanding the fact that it has been briefed and argued. We express no opinion on the resolution of this issue, leaving the matter in the first instance to the district courts. The cases are remanded for the development of an adequate factual record and a ruling by the district courts on the propriety of adding WMATA as a defendant by a Rule 15(c) amendment.

IV. Section 933(b) of the Longshoremen's and Harbor Workers' Act

On August 28, 1981, appellant Williams received a lump-sum workmen's compensation award. More than six months later, on April 1, 1982, Williams instituted a third-party negligence action against WMATA. The district court dismissed Williams' action because it was not filed within the six-month statutory period as provided in 33 U.S.C. § 933(b).[20] *Williams v. Washington Metropolitan Area Transit Auth.*, No. 82-0999 (D.D.C. Oct. 6, 1982). Williams challenges the district court's dismissal of his action and attempts to excuse his delay in instituting suit by relying upon the so-called *"Czaplicki* exception," fashioned by the Supreme Court in *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1956).

In *Czaplicki*, an injured employee accepted a workmen's compensation award which, under the statute as it existed then, effected an automatic assignment of his third-party claims to his employer. In turn, his employer's insurer was subrogated to the employer's rights. Seven years after receiving the compensation award, when no third-party action had been filed, Czaplicki instituted a negligence action against several potentially liable third-parties. Czaplicki's employer and one of the third-party defendants were insured by the same company, Travelers Insurance Company. Recognizing that the substantial conflict of interests inherent in this circumstance made it extremely unlikely that the insurer would proceed against this third-party, the *Czaplicki* Court held that section 33

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[20] Section 33(b) of the Longshoremen's Act, 33 U.S.C. § 933(b) (1976), provides:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(b) did not prevent the employee from pursuing his third-party action. The Court reasoned that in order to insure that a party with sufficient adversarial interests remained to institute a third-party action, the employee would be permitted to maintain his action, notwithstanding the fact that he had accepted an award of compensation. The *Czaplicki* Court found it significant that there was "no other procedure by which [the employee could] secure his statutory share in the proceeds, if any, of his right of action." *Id.* at 532-33.

In 1959, after *Czaplicki*, Congress amended the relevant provisions of the Act to their present form by eliminating the election requirement under subsection (a), postponing assignment of the claim under subsection (b) until six months after acceptance of a compensation award, and allowing the assignee to retain twenty percent of any excess recovery as a financial incentive to pursue a third-party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. Under the statute as amended, an injured employee is not required to elect between receiving a workmen's compensation award and seeking damages from a third party. 33 U.S.C. § 933(a). The employee may accept a compensation award and, as long as he acts within six months, institute an action against any potentially liable third party. If, however, he fails to institute suit within six months, acceptance of the compensation award acts as an assignment to the employer of any and all third-party claims which the employee might have. *Id.* § 933(b). The insurer of the employer continues to be subrogated to all rights of the employer. *Id.* § 933(h).

Following amendment of the Act, the Supreme Court held, in *Rodriquez v. Compass Shipping Co.*, 451 U.S. 596 (1981), that failure to institute a third-party action within the statutory six-month period was an absolute bar to a subsequent action by the employee. Although *Rodriquez* did not involve a *Czaplicki* conflict-of-interest and the Court expressly declined to reach the *Czaplicki*

scenario,[21] the opinion for the Court cast serious doubt upon the viability of the *Czaplicki* conflict-of-interest exception. The *Rodriquez* Court was careful to confine *Czaplicki* to the "peculiar facts" of that case and emphasized the importance of the intervening amendments in alleviating the hardship which existed in the *Czaplicki* circumstance. The Court stated:

> [T]he 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-533. After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation.

Rodriquez, supra, 451 U.S. at 617 n.41. Relying upon the express statutory language, the *Rodriquez* Court emphasized the mandatory nature of the assignment which occurs after the six-month period. "Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." *Id.* at 612. Finally, the Court reasoned that the legislative history "forecloses the argument that Congress did not intend an assignment of a third-party

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[21] In a footnote the *Rodriquez* Court stated:

> Whether the statutory language [section 33(b)] provides the exclusive solution for unusual conflict-of-interest problems, such as that identified in *Czaplicki*, is a question that is not presented on the facts of these cases. We accordingly do not decide whether, or to what extent *Czaplicki* survived the 1959 amendments.

451 U.S. at 612 n.30.

claim to be effective unless there was an absence of any potential conflict of interest between the asssignee and the [employee]." *Id.*

Considering *Czaplicki*, *Rodriquez*, and the the statute as it exists today, we conclude that the *Czaplicki* exception no longer permits an employee to institute a third-party action after the six-month statutory window.[22] Given the statutory language and legislative history relied upon by the *Rodriquez* Court, it is apparent that reading a *Czaplicki* exception into the section 33(b) assignment scheme would frustrate the balance struck by Congress between the employer's and employee's interests. That balance alleviates the hardship which *Czaplicki* was crafted to remedy. Acceptance of a compensation award no longer automatically assigns the employee's third-party claims to his employer. Where the employee suspects a potential *Czaplicki* conflict-of-interest he has six months after accepting a compensation award within which to institute suit himself.

For the foregoing reasons, we do not think that the *Czaplicki* exception survived the post-*Czaplicki* amendment of the Act and *Rodriquez*. Plaintiffs who accept compensation awards must comply with section 33(b) and institute any third-party claims within six months of accepting such award. Because Williams failed to institute his action within the statutory time frame the district court properly dismissed the action. The fact that both parties were insured by the same compensation car-

[22] Our decision is in accord with an earlier decision by a panel of this court, Phillippi v. Bechtel Assoc. Prof. Corp., No. 82-1615 (D.C. Cir. Feb. 24, 1983), and with two unpublished memorandum opinions by district courts in this Circuit. Phillippi v. Bechtel Assoc. Prof. Corp., No. 81-1154 (D.D.C. April 28, 1982) and Jenkins v. Bechtel Assoc. Prof. Corp., No. 81-2236 (D.D.C. Feb. 23, 1982). The District of Columbia Court of Appeals has also recently repudiated the conflict-of-interest exception. Thomas Westbrook v. Hutchinson Crane Ecavating [sic] Co., No. 82-1151 (D.C. App. June 30, 1983).

rier does not excuse the plaintiff's delay in instituting his third-party claim. The judgment of the district court is affirmed.

V. CONCLUSION

The Clerk is directed to issue judgments in the respective cases in accordance with the foregoing opinion.

APPENDIX N

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 81-00963

No. 82-2017

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*,

Appellees

And Consolidated Cases

[Filed Oct, 3, 1983]

Before: Robinson, Chief Judge; Wright, Circuit Judge, and MacKinnon, Senior Circuit Judge

ORDER

On consideration of Appellee Washington Metropolitan Area Transit Authority's Petition for Rehearing, filed September 2, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX O

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 81-00963

No. 82-2017

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*,

Appellees

And Consolidated Cases

[Filed Oct, 3, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

The Suggestion for Rehearing *en banc* of Appellee Washington Metropolitan Area Transit Authority, filed September 2, 1983 has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Wald did not participate in this order.

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-00963

No. 82-2017

PAUL D. JOHNSON,

Appellant

v.

BECHTEL ASSOCIATES
PROFESSIONAL CORPORATION, D.C., *et al.*
And Consolidated Cases

[Filed Oct. 19, 1983]

Before: Robinson, Chief Judge, Wright, Circuit Judge and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the motion of Appellee WMATA for stay of mandate pending application for certiorari, it is

ORDERED by the Court that the motion is granted and the Clerk is directed to withhold issuance of the mandate of this Court to and including November 7, 1983.

For The Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk